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No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,
Petitioner,

v.

OLIVETTI OFFICE U.S.A., INC. and OLIVETTI SUPPLIES, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Second Circuit's refusal to enforce as "penal" the NLRB's remedy for a decision bargaining violation due to the Board's six year delay in reaching a final decision require the NLRB to place the consequences of its own delay upon wronged employees to the benefit of wrongdoing employers?

2. When an employer has unlawfully refused to bargain over a decision to relocate and subcontract bargaining unit work, may an appellate court fashion its own remedy based upon its determination that bargaining over the decision would have concluded as of the date bargaining over the effects of the decision concluded?

LIST OF PARTIES

International Union, U.A.W., Local 376

National Labor Relations Board

Olivetti-Office, U.S.A., Inc.

Olivetti Supplies, Inc.

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No. ———

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner United Automobile, Aerospace and Agricultural Implement Workers Union Local 376 petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case.

OPINION BELOW

The opinion of the Court of Appeals, reported at 926 F.2d 181, appears in Appendix A attached hereto. (App. 1a) The decisions and orders of the National Labor Re-

lations Board, together with the decisions of the administrative law judge, are reported at 298 NLRB No. 73 (1990) and 284 NLRB No. 88 (1987) and appear in Appendices B-E attached hereto. (App. 19a-94a)

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit was anonunced on February 14, 1991. (App. 1a) A timely petition for rehearing and suggestion for rehearing in banc was denied on April 2, 1991 (App. 95a), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED [1]

United States Code, Title 29:

Section 158(a)(1)

Section 158(a)(5)

Section 160(c)

Section 160(e)

Section 160(f)

Section 160(j)

STATEMENT OF THE CASE

This case arises from the unlawful refusal of an employer to bargain with a union over its decision to relocate and subcontract bargaining unit work, and the nearly six years that elapsed from the date of the filing of unfair labor practice charges and the date that the National Labor Relations Board entered its final order. The Second Circuit upheld the Board's findings of unlawful conduct but severely limited the Board-ordered rem-

[1] Relevant portions of the statutes are reproduced in Appendix I, *infra*, beginning at page 113a.

edy. In the court's view the lapse of time had rendered the remedy punitive and the remedy thus served no legitimate purpose under the Act.

Respondents, Olivetti Office U.S.A. Inc. and Olivetti Supplies Inc., are successors in interest to Roytype Division, Triumph-Adler Royal, Inc. Roytype in turn had been a division of Pertec Computer Corp., a wholly owned subsidiary of Triumph-Adler North America, Inc., which in 1983 entered into a two year collective bargaining agreement with the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, Local 376 covering approximately 180 production and maintenance employees at its Newington, Connecticut facility. On April 9, 1984 the employer notified the Union that it would be implementing a three-step subcontracting/relocation plan which it projected would result in the closing of the Newington facility by March or April of 1985 and the transfer of all bargaining unit work to either a Mexican subcontractor or to a new facility to be constructed in Georgia. According to the employer, the removal of bargaining unit work and the closing of the Newington facility would save the company $2.6 million, $2 million of which would be directly attributable to reduced labor costs. Prior to announcing its decision, the employer had "discussed" its plans with representatives of the bargaining unit at meetings which the employer insisted were not bargaining sessions, and had refused to provide the Union with information which was necessary for bargaining.

Five days after the announcement of the employer's decision, the Union filed unfair labor practice charges with the National Labor Relations Board. A consolidated complaint issued July 24, 1984. Although both the Officer-in-Charge of then-NLRB Subregion 39 and the Board's General Counsel recommended that an injunction be sought pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. Section 160(j), preventing the

employer from implementing its subcontracting/relocation plan pending the outcome of the unfair labor practice proceedings, the NLRB ultimately refused to seek the injunction and the plan was unilaterally implemented by the employer over the next several years.

While the relocation plan was being carried out, and while the unfair labor practice charges were pending before the Board, the parties engaged in bargaining over the effects of the relocation and subcontracting on members of the bargaining unit. In addition, since work continued to be done in Newington after the initial collective bargaining agreement expired, a new contract was negotiated by the parties in March 1985. The 1985 agreement essentially extended the terms and conditions of the prior contract through the period that bargaining unit work continued to be done in Newington, but included a clause permitting either side to terminate it if the employer were ordered to return its operations to Connecticut. Throughout the period 1984 through 1986 the employer continued to remove its operations from Newington piece by piece. Bargaining unit work, on a progressively shrinking scale, continued to be done in Newington until July 1986, when the employer laid off the final bargaining unit employee.

The first unfair labor practice hearing in this case concluded in January, 1985. At that time, 113 of 162 bargaining unit employees remained on the job in Newington. On August 20, 1985 the administrative law judge issued his recommended decision and order, finding that the refusal of the Employer to bargain over the relocation decision was unlawful. (App. E. p. 52a) By way of remedy, the judge ordered back pay for all employees from the date of lay off through March 23, 1985, the expiration date of the initial collective bargaining agreement. The judge indicated that the restricted remedy had been fashioned because the Newington facility had already been closed, an assumption which was not correct. (App. pp. 89a-92a)

In fact, subsequent to the judge's finding that the removal of work was unlawful, Respondent's own figures reflect the expenditure of $3,929,560.90 attributed to "cost of relocation." In January and February of 1986, six months after the judge's decision issued, the Employer modified its lease on the Newington facility, to accelerate its termination date from February 1987 to February 1986, at the added cost of $125,000.00. It was not until June 1986, ten months after the Judge's decision, that the employer disassembled and moved from Newington to its new Georgia facility its Midland Ross coater, the inking machine which is a central component in its manufacturing process.

The Board upheld the judge's findings of violations of Sections 8(a)(1) and (5) or the Act,[2] but remanded the case for further proceedings on the issue of remedy in light of the judge's erroneous determination that the Newington facility had closed, and his limitation of the remedy based upon that assumption. (App. D, p. 51a) The decision of the Board issued June 30, 1987.

The remand proceedings before the administrative law judge concluded on November 5, 1987, and his supplemental decision was handed down on March 31, 1989. (App. C, p. 28a) On May 22, 1990 the Board issued its supplemental decision (App. B, p.19a), modifying the order of the administrative law judge to reflect the remedy which the Board had recently fashioned in a similar case, *Reece Corp.*, 294 NLRB No. 33 (1989) The Board required the employer to offer bargaining unit employees work at its new facilities, discharging current employees if necessary, and paying the Newington employees' travel and relocation expenses; to make bargaining unit employees whole for lost wages and benefits; to place em-

[2] The Board declined to adopt the judge's additional findings that the unilateral relocation violated both Section 8(a)(3) of the NLRA and the terms of the collective bargaining agreement. Those issues are not before the Court on the petition.

ployees for whom positions did not currently exist on a preferential hire list; and, for those employees who declined offers at the Georgia facility, to provide backpay and benefits up to the point where they secured substantially equivalent employment in Connecticut. (App. p. 23a-25a)

The Employer filed a petition for review of the decision of the NLRB with the United States Court of Appeals for the Second Circuit pursuant to 29 U.S.C. Section 160(f) on May 31, 1990. The Union intervened in that case, and filed its own petition for review, seeking a restoration of the bargaining unit work to Newington. The National Labor Relations Board also filed a petition for enforcement pursuant to 29 U.S.C. Section 160(e). The three cases were consolidated before the Second Circuit.

On February 14, 1991 the Second Circuit issued its decision. In agreement with the Administrative Law Judge and the National Labor Relations Board, the court found that the unilateral implementation of the relocation and subcontracting plan was unlawful but that restoration would be unduly burdensome. The court rejected the Board's remedial order, however, holding that the remedy "not only fails to address the wrong to be remedied, but the Board's unreasonable and unexplained delay in reaching its decision results in a remedy that does not further any purpose of the Act." *Olivetti Office U.S.A. v. NLRB*, 926 F.2d 181, 190 (App. p 19a) The panel was of the view that the Board's remedial order compensated the bargaining unit for the *effects* of the work transfer rather than for the unlawful *decision* to transfer work without bargaining. *Id.* pp. 189-190 (App. p. 16a) With respect to back pay, the court found the Board's order unreasonable because "it assumes that, had the parties negotiated, those negotiations would have continued for six years and possibly into the future." *Id.* at 190 (App. pp. 17a-18a) With respect to the order to order reinstatement to bargaining unit employees, the court held without elaboration that the changes in the internal struc-

ture of the Company made that remedy "unreasonable and unrealistic." *Id.* (App. p. 18a)

The court determined that the Board's remedy had become "penal or confiscatory" because of the Board's delay, and substituted its own remedy, tailored to the period of time in which the court felt that the parties would have lawfully bargained. The Order as modified by the court directs the employer to pay backpay only through March 23, 1985. *Id.*

The Union filed a timely request for rehearing and suggestion for rehearing in banc which the court denied on April 2, 1991. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED AS TO THE FIRST QUESTION PRESENTED

1. The decision of the court of appeals modifying the remedy fashioned by the Board because of the length of time that the unfair labor practice proceedings consumed is directly contrary to this Court's decision in *NLRB v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). It is also in direct conflict with holdings of the Third and Sixth Circuits. *NLRB v. Wallkill Valley General Hospital*, 866 F.2d 632, 637 (3d Cir. 1989); *NLRB v. Seligman & Associates*, 808 F.2d 1155, 1161 (6th Cir. 1986)

In *Rutter-Rex*, this Court held that a court of appeals' decision eliminating or limiting backpay for employees otherwise entitled to it because of the Board's delay in issuing a backpay specification improperly penalized the innocent employees and "exceeded the narrow scope of review provided for the Board's remedial orders" 396 U.S. at 266. The court of appeals had found that the delay was "inordinate" and modified the Board's order to provide an earlier cutoff date for backpay. This Court found that the reviewing court's modification represented the court's "effort to discipline the Board for its delay" by shifting part of the cost of the Board's delay from the

wrongdoing company to the innocent employees. *Id.* at 262.

In reversing the court of appeals, this Court stated that, "[a]s with the Board's other remedies, the power to order back pay 'is for the Board to wield, not for the courts.'" *Rutter-Rex*, 396 U.S. at 263 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)). The purpose of the backpay order is reparative; it is "designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Id.*, at 263, (quoting *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952)). Citing longstanding precedent, *NLRB v. Electric Cleaner Co.*, 315 U.S. 685, 698 (1942) and *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962), the Court added that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." 396 U.S. at 265. Although not condoning the delay in the administrative process, the Court concluded that "[i]t is even more deplorable if, as seems clear, innocent employees had to live for some years on reduced incomes as a combined result of the delay and the company's [unfair labor practice conduct]" *Id.*, at 265-266. The principles of *Rutter-Rex* were reaffirmed in *NLRB v. Ironworkers Local 480*, 466 U.S. 720, 725 (1984) (per curiam).

In the case at bar, the fundamental premise of the refusal of the appellate court to enforce the remedial order of the Board rests upon its view that the six years that have passed in this case have so profoundly effected the *employer* that the Board-ordered remedy has become penal. By refusing to enforce the Board's order because of administrative delay, the Second Circuit has re-cast the balance struck by the Board and approved by this Court in *Rutter-Rex*, and has in effect held that the innocent victims of an employer's unlawful conduct must bear the additional cost of the Board's delay. This holding cannot be squared with *Rutter-Rex* and certiorari should be granted on that basis alone.

Intercession by this Court is also needed in order to resolve the conflict between the circuits on an important question of federal law. The Second Circuit's divergence from the other appellate courts began with *Emhart Industries, Hartford Division v. NLRB*, 907 F.2d 372 (2d Cir. 1990), where one of the alternative bases of the court's holding was that the passage of time had rendered the remedy meaningless.[3] This divergence becomes still starker in the case at bar when the Board's delay becomes the primary basis for the court's holding and the teaching of *Rutter-Rex* is simply ignored. However, other appellate courts have considered *Rutter-Rex* controlling. Thus, in *NLRB v. Seligman & Associates*, 808 F.2d 1155, 1161 (6th Cir. 1986) the Sixth Circuit held that *Rutter-Rex* requires that discriminatees be reinstated and provided full backpay despite a seven-year delay in the NLRB's ruling on exceptions filed by the employer to a decision of the administrative law judge. *NLRB v. Seligman & Associates*, 808 F.2d 1155, 1161 (6th Cir. 1986) ("[the Supreme Court] has held that the Board does not err when it places the full cost of an unfair labor practice on the employer who committed it, even when the cost of backpay is greatly increased by the Board's own deplorable delay in processing the charge.") *Cf. Teledyne Industries v. NLRB*, 911 F.2d 1214, 1221 (6th Cir. 1990) (error of NLRB does not excuse according full relief to victims of unlawful conduct). Similarly, in *NLRB v. Wallkill Valley General Hospital*, 866 F.2d 632, 637 (3d Cir. 1989) the Third Circuit interpreted

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[3] *Emhart* presented a distinctly different fact pattern in which it was alleged that an employer had unilaterally changed the order in which laid off employees were to be recalled. Between the time that the unfair labor practice charges were filed and the date of judicial review, the parties had negotiated two collective bargaining agreements which contained a provision expressly dealing with the recall issue which had formed the basis of the unfair labor practice charge. The Second Circuit gave great weight to this circumstance in determining that any additional remedy would further no purpose under the Act. *Emhart*, 907 F.2d at 378-80.

Rutter-Rex as forbidding a reviewing court from considering the effect of administrative delay on the wrongdoing employer. This conflict in the circuits also requires the intervention of this Court as to the first question presented.

2. The decision of the Second Circuit also presents a profound and unwarranted expansion of the scope of judicial review of NLRB orders which conflicts with long-standing Supreme Court precedent. The court's holding that the Board-ordered remedy furthers no purpose under the Act undeniably represents the substitution of the court's policy judgment for that of the Board, to whose expertise Congress has delegated the duty of determining how best to undo the effects of unfair labor practices. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 905-906 (1984); *Shepard v. NLRB*, 459 U.S. 344, 349 (1983); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) the Court held that the Seventh Circuit's modification of an NLRB remedial order exceeded the narrow scope of judicial review. In so doing, the Court reaffirmed its interpretation of Section 10(c) of the Act as:

> vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review. . . . "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."

Id., at 898-899 (citations omitted) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In the instant case, the Second Circuit has failed to respect the limited scope of its reviewing authority, and has declined to enforce a remedy which clearly and unequivocally was intended to restore the victims of an unlawful plant closing to the positions they would have occupied absent the Em-

ployer's refusal to engage in decision-bargaining. The Board-ordered remedy of reinstatement and backpay has long been recognized as an appropriate means of restoring the status quo ante. Such relief provides an economic incentive for employers to negotiate *before* changing working conditions and discourages employers from taking steps which suggest to the workers that the union is powerless to protect them. *Lapeer Foundry and Machine, Inc.*, 289 NLRB 952, 955 (1988) (*quoting NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987)). *See also NLRB v. Sandpiper Convalescent Center*, 824 F.2d 318, 321 (4th Cir. 1987).[4]

Indeed, this case represents a particularly pernicious example of judicial encroachment upon the remedial authority of the Board. In purporting to take account of the Board's 6 year delay in reaching its decision, the Second Circuit utterly failed to consider the Employer's abuse of that delay for its own purposes. The Employer was aware from the time of the issuance of the complaint in July 1984 that the NLRB's prosecutorial arm, the General Counsel, was charging that the Employer's refusal to bargain was unlawful. The Employer knew as of August 20, 1985, when the administrative law judge issued his first decision that its refusal to bargain had been found unlawful, and that only the mistaken belief that its Connecticut operations had already been closed prevented the

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[4] In *Lapeer Foundry*, the Board considered and rejected the suggestion that employees who had been laid off by an employer who had refused to engage in decision bargaining should not be awarded reinstatement and backpay unless they could establish that bargaining would have prevented their layoffs. The Board indicated that such a rule would "unnecessarily inject the Government into an area in which the collective bargaining process should be permitted to function." *Lapeer Foundry & Machine, Inc.*, 289 NLRB 955 (1988). Citing *Hamilton Electronics Co.*, 203 NLRB 206 (1973) and *Southwest Forest Industries*, 278 NLRB 228 (1986), it further held that the wrongdoing employer rather than the employees should bear the consequences of the employer's disregard of its statutory obligations. *Id.*

judge from issuing a standard make whole remedial order directing the employer to restore and maintain its operations in Connecticut and to bargain with the Union. The unlawfulness of the employer's conduct, and the need for an appropriate make-whole remedy was reaffirmed at each subsequent stage of the NLRB proceedings culminating in the final Board order of May 22, 1990. The Employer spent this time refusing to bargain or to provide necessary information to the Union while callously completing the move that it knew had already been found to be unlawful. To protect this Employer from the supposed consequences of administrative delay is to reward it for violating the Act. Such a wrongdoer acts at its own peril, not at the peril of its innocent employees. Thus, the Second Circuit has not only ignored the limitations on judicial review emphasized in *Sure-Tan*, it has also gutted the remedial authority of the Board by allowing the Employer to profit from deliberate wrongdoing. Certiorari should be granted as to the first question for these reasons as well.

II. CERTIORARI SHOULD BE GRANTED AS TO THE SECOND QUESTION PRESENTED

In arrogating to itself the task of fashioning a remedy, the Second Circuit made its own approximation of what would have occurred had the employer not refused to engage in decision bargaining with the union. According to the court, good faith negotiations over the decision to relocate would not have continued beyond March 23, 1985, when the parties engaged in effects bargaining and negotiated a new contract covering bargaining unit members who were still working at the Newington facility. There is no evidence in the record to support this conclusion.[5] In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883

[5] Ironically, the remedy fashioned by the appellate court is the same remedy that was initially ordered by the administrative law judge, and which the NLRB rejected as being analytically and factually flawed.

(1984), this Court expressly held that such estimates by reviewing courts are improper in the absence of relevant factual information or adequate analysis. *Id.*, 901-902 n.11.[5]

A crucial defect in the court's decision is that it allows an employer, by bargaining over the *effects* of a decision to subcontract or relocate, to escape liability for a *decision* bargaining violation. The court thus utterly fails to take account of the profound difference between the Act's dual requirement of bargaining over a decision to remove work from the bargaining unit and bargaining over the effects of the removal of work. In effects bargaining, of course, the decision to move is a *fait accompli*, and the bargaining is thus limited in scope to issues that derive from, rather than impact, the decision as to whether to move. In decision-bargaining, by contrast, the very purpose of the bargaining is to explore alternatives which could modify or undo the employer's decision.

By treating the effects bargaining that occurred in 1985 as compensating the union for the employer's refusal to engage in bargaining over the decision itself, the Second Circuit trammels years of this Court's jurisprudence extending from *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964) to *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). This entire line—which the Board has just this month identified as presenting "hard questions . . . indeed some of the most polarizing ques-

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[5] In *Sure-Tan*, Justice O'Connor held that the reviewing court had overstepped the limits of its own authority by modifying the Board's order to provide that each discriminatee receive backpay for at least six months on the basis of the court's view that "six months is a reasonable assumption of the minimum time that the discriminatees would have remained employed but for the employer's unlawful conduct." *Id.* at 899. This Court found the lower court's imposition of the minimum backpay "in the total absence of record evidence as to the circumstances of the individual employees" to be pure speculation which did not comport with the general reparative policies of the NLRA. *Id.*, at 901.

tions in contemporary labor law," *Dubuque Packing Company, Inc.*, 303 NLRB No. 66 (6/19/91)—has turned upon the distinction between the obligations to engage in decision and effects bargaining. The NLRB has recognized the importance of this distinction by adopting entirely different remedies for decision violations as compared to effects.[7] This carefully delineated distinction is rendered meaningless by allowing effects bargaining to excuse an employer's violation of its duty to engage in decision bargaining.[8] Indeed, the Second Circuit's decision will encourage employers to ignore clear decision bargaining obligations and to bargain only over effects, even where "the benefit [of decision bargaining] for labor management relations and the collective bargaining process," *First National, supra* at 678, far "outweighs the burden placed on the conduct of the business." *Id.* This is because under the Second Circuit's analysis, the Union will have no remedy for the decision bargaining violation once the effects bargaining occurs. Certiorari should thus be granted on the second question presented because the Second Circuit's decision conflicts with applicable decisions of this Court on issues of profound importance to federal labor law.

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[7] Cf. *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 955, n.11.

[8] The court's reasoning that decision bargaining would have merged with effects bargaining is rendered still more inexplicable in light of the court's upholding of the Board's finding that the employer unlawfully refused to provide the information which the Union needed for decision bargaining. Thus, even assuming the Employer had agreed to bargain over the relocation decision, its unlawful refusal to provide information would have prevented the parties from reaching agreement or impasse.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Court of Appeals should be reversed summarily on the authority of this Court's decisions in *Rutter-Rex* and *Sure-Tan.*

Respectfully submitted,

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July 1, 1991

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 659, 660, 661—August Term, 1990

(Argued: November 26, 1990

Decided: February 14, 1991)

Docket Nos. 90-4068, 90-4082, 90-4094

OLIVETTI OFFICE U.S.A., INC.,
OLIVETTI SUPPLIES, INC.,
Petitioners-Cross-Respondents (90-4068),

—v.—

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner (90-4094),

UAW LOCAL 376,
Intervenor (90-4068).

UAW LOCAL 376,
Petitioner (90-4082),

—v.—

NATIONAL LABOR RELATIONS BOARD,
Respondent,

OLIVETTI OFFICE U.S.A., INC.,
OLIVETTI SUPPLIES, INC.,
Intervenors.

NATIONAL LABOR RELATIONS BOARD,
Petitioner (90-4082),

—v.—

ROYTYPE DIVISION, TRIUMPH-ADLER ROYAL INC. AND ITS SUCCESSORS, OLIVETTI OFFICE U.S.A. INC., and OLIVETTI SUPPLIES, INC.,

Respondents.

Before:

OAKES, *Chief Judge*,

CARDAMONE and MCLAUGHLIN, *Circuit Judges.*

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JOHN H. FAWLEY, Washington, D.C. (Howard E. Perlstein, Supervisory Attorney, Jerry M. Hunter, General Counsel, Robert E. Allen, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C., of counsel) *for National Labor Relations Board.*

MCLAUGHLIN, *Circuit Judge*:

These cross-petitions for review and enforcement of an order of the National Labor Relations Board ("the Board") present two significant issues, one of which we find troubling. First, we must determine whether the Board properly held that Roytype Division, Triumph-

Adler Royal, Inc. ("the Company"), predecessor in interest of petitioner Olivetti Office U.S.A., Inc., committed an unfair labor practice by failing to bargain with International Union, United Automobile, Aerospace and Agriculture Implement Workers of America, Local 376 ("the Union") on a mandatory subject of bargaining. Since we answer the question in the affirmative, we must then consider whether the Board-ordered remedy is appropriate.

BACKGROUND

On March 23, 1983, the Company—then located in Newington, Connecticut—and the Union executed a two-year collective bargaining agreement. By November, 1983, the Company found itself in financial straits. The Company's new president, James Snider, met with representatives of the Union to report that the Company had lost $6.6 million in 1982, $5 million in 1983, and he projected a loss of $1.9 million for 1984. Snider told the Union of certain cost-cutting measures he had already implemented. He also indicated that a financial study commissioned by the Company had revealed that the Company's labor costs were too high. Snider then warned the Union that certain wage increases contained in the collective bargaining agreement might have to be renegotiated and that some bargaining-unit work might also have to be subcontracted or relocated.

Not surprisingly, this news caused a stir within the Union and soon after the meeting the Union's president, Philip Wheeler, asked the Company to furnish financial data to substantiate the Company's claims of financial hardship. Wheeler assured the Company that all information disclosed would remain confidential. The Union's shop steward also passed along a rumor to the Union's officers that some of the bargaining-unit work had already been subcontracted, and, based on this information, the Union requested the Company to provide any data that would tend to verify or discount this claim. The

Company furnished some of the requested financial data, but the Union's financial analyst, Gerald Lazarowitz, found the information inadequate, as it consisted primarily of summaries of the underlying documents. Lazarowitz pressed for the basic documents, including the financial study commissioned by the Company, but the Company claimed that it was unable to provide this information for reasons of confidentiality. The Company also failed to provide any information regarding the alleged subcontracting.

In February, 1984, Snider again met with the Union's representatives and outlined a three-point plan that would result in subcontracting some of the production work to a low-cost labor region in Texas or Mexico. The plan also envisioned the relocation of the remainder of the bargaining-unit work to a plant in Georgia. Snider stated that these steps would save the Company $2.6 million, $2 million of which would be directly attributable to reduced labor costs.

After the Company unfurled this bold plan, the Union stepped up its efforts to obtain the financial data it had been seeking. The Union particularly wished to examine the Company's self-commissoned financial study and the raw financial data upon which the study was based. While the Company refused, once again, to release a copy of the financial study to the Union, it did allow Lazarowitz to visit the Company's plant to review the study.

At the plant, Lazarowitz was informed that he could review the financial study but that he would not be allowed to take a copy of it with him. The Company also refused Lazarowitz's renewed request to examine the underlying financial data upon which the study was based, ostensibly for reasons of confidentiality.

The record indicates that the parties met again on March 7, 1984, and the Union expressed its continued dissatisfaction with the Company's refusal to provide the

raw financial data. At this meeting—in response to a blunt inquiry by Wheeler—the Company indicated that if the Union were willing and able to make $1.8 million in concessions, the Company would continue its operations in Connecticut. Again, the Union requested access to the Company's financial records; again the request was denied.

During the next month, the Union and the Company communicated several times. Proposals and counter-proposals were made. The final proposal by the Company provided for the following: the Union would agree to forego a scheduled five percent pay increase; the Company would implement Part A of its three-point plan, allowing it to subcontract a portion of its production to Mexico; and the Union would pick a consultant who would make a binding determination as to whether costs could be sufficiently cut to avoid the implementation of Parts B & C of the three-point plan, which called for relocation of the remainder of the Company's operations. The Union responded to this proposal, again requesting all relevant financial data. The Company refused to provide the requested information, and, on March 29, 1984, the Union rejected the final proposal.

In April 1984, the Company made its final decision to implement the three-point subcontracting and relocation plan. Lay-offs of union employees began in November, 1984. Machinery and operations were transferred to Georgia in early 1985. The last of the employees in Connecticut were laid off by July 1986, and the Connecticut plant was shut down in March 1987. The relocation cost the Company more than $4 million.

"Action" By The Board

The Union filed an unfair labor practice charge in April 1984, charging the Company with failure to bargain collectively over a mandatory subject of bargaining, in violation of Sections 8(a)(1), (5), and 8(d) of

the National Labor Relations Act ("the Act"). 29 U.S.C. § 158(a)(1), (5), and § 158(d) (1988). An Administrative Law Judge ("ALJ") held a hearing from January 28, 1985 through February 1, 1985. On August 20, 1985, the ALJ issued a decision that the Company had committed unfair labor practices in violation of Sections 8(a)(1) & (5) by failing to provide the requisite information to the Union.[1] As a remedy, the ALJ ordered back pay for all employees from the date of lay-off through March 23, 1985, the expiration date of the collective bargaining agreement.

Objections to the ALJ's ruling were filed by the parties, and, on June 30, 1987 (almost two years later), the Board issued a decision, agreeing that the Company had committed an unfair labor practice in violation of Sections 8(a)(1) & (5) of the Act. It disagreed, however, with the ALJ's remedy because that remedy was based on the erroneous assumption that the Company had terminated all operations as its Connecticut plant prior to the ALJ's decision. The Board, therefore, vacated the remedy and remanded the matter to the ALJ for further proceedings.

On remand, the ALJ held a hearing from November 3, 1987 through November 5, 1987. The ALJ issued a decision on March 31, 1989, more than fifteen months later, that it would be unduly burdensome to require the Company to move its operations back to Connecticut. As a remedy, the ALJ ordered the Company to fulfill its obligation to bargain with the Union over the decision to relocate and subcontract unit work. Additionally, he directed the Company to pay all baragining unit employ-

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[1] The ALJ also found that the Company had violated section 8(a)(3) of the Act by discriminating against its employees because of their status as union members. The Board reversed this determination because it had not been litigated. This aspect of the Board's ruling has not been contested.

ees back pay until the bargaining obligation was fulfilled.

On May 22, 1990, over thirteen months later, the Board issued a supplemental decision. The Board agreed that the Company should not be required to return its operations to Connecticut, but it again disagreed with the remedy ordered by the ALJ. The Board ordered reinstatement of all bargaining unit employees and payment of any travel and moving expenses. Additionally, the Board ordered the Company to pay all bargaining unit employees back pay from the date of termination to the date of reinstatement, or, for those employees who decided not to relocate, to the date they obtained "substantially equivalent employment" elsewhere. Finally, with respect to employees who had been working in the wide film and fabric operation—a discrete operation sold by the Company in May 1986—the Board ordered back pay through the date of sale.

The present series of cross-petitions to this Court began with the Company's petition to review the Board's order. The Company argues that it did not commit any unfair labor practices, but that even if it did, the Board's remedy is improper because it fails to effectuate any legitimate remedial purpose of the Act. The Union, on the other hand, petitioned for review claiming that the Board's remedy is insufficient to restore the *status quo ante* and that the Board should have ordered the Company to move all its operations back to Connecticut. The Board, of course, petitioned for enforcement of its order.

DISCUSSION

The Duty to Bargain

We turn first to the question whether the Company's decision to subcontract and relocate was a mandatory subject of bargaining.

Section 8(d) of the Act requires employers to bargain in good faith with unions "with respect to wages, hours,

and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d). Congress has delegated authority to the Board to decide whether a specific grievance is a mandatory subject of bargaining, and because of the Board's expertise in labor-management relations, its determination will be upheld if it is a "reasonably defensible" interpretation of the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-97 (1979).

Decisions affecting the profitability of a company are mandatory subjects of bargaining "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of business." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981). If the underlying problem is not "amenable to resolution through the bargaining process," mandatory collective bargaining would only hamper an employer's ability to conduct his business as he sees fit. *See id.* at 678. Conversely, where a particular grievance may be resolved through collective bargaining, then negotiations would promote the goal of the collective-bargaining process—that is, the promotion of industrial peace. A tension is therefore evident between the protection that the Act was intended to afford organized labor and the latitude that employers must be given to conduct their business; and a sensitive balancing must be performed to determine whether a particular grievance is a mandatory subject of bargaining.

When an employer takes action that is economically motivated but results in no change in basic business operations, that action is subject to mandatory bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213 (1964). This occurs where an employer simply transfers union work to other non-union workers, but continues its same operations. Such a work transfer based on labor costs is the type of grievance particularly suited to resolution through the collective bargaining process. *See id.* at 213-14; *see also First National*

Maintenance, 452 U.S. at 680 (decisions by an employer motivated by "a desire to reduce labor costs" are amendable to resolution through collective bargaining).

The Company's decision in the present case to subcontract and relocate was obviously motivated by "a desire to reduce labor costs." When the Company unveiled its work-transfer plan in February 1984, it stated that the plan would reduce manufacturing costs by $2.6 million, $2 million of which would be directly attributable to cheaper labor. Additionally, the Company informed the Union that if the Union could reduce labor costs by $1.8 million, the Company would not implement its relocation/subcontracting plan. Obviously, labor costs were the driving force behind the Company's action, and the problem was particularly suited to resolution through collective bargaining.

Balancing this benefit to the collective bargaining process against a possible burden on the conduct of the Company's business, it is clear that the Company's course of conduct would not have been unduly hampered by bargaining. The Company planned to continue its same manufacturing operations and, by its own admission, would have been willing to forego the work transfer and remain in Connecticut if the Union made certain concessions. The Company has failed to demonstrate any economic exigencies that might justify an employer's need for speed and flexibility in making business decisions. *First National Maintenance*, 452 U.S. at 682-83. Thus, in the present situation, mandatory bargaining would benefit the collective bargaining process and that benefit clearly would outweigh any burden on the Company's course of business.

The Company argues that the futility of bargaining was apparent from the Union's position, and, therefore, bargaining should be excused. The argument misses the point. One party cannot side-step mandatory bargaining simply by declaring that negotiations would be fruitless.

Collective bargaining is mandated for the purpose of attempting to resolve even the most difficult disputes. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("[t]he basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement"). Experience teaches that the initial belief of one party in the inflexibiilty of the other is often dispelled by subsequent concessions. To excuse mandatory bargaining because one party thinks it would be futile would tear the fabric of the entire collective bargaining process.

We hold, therefore, that the Board's determination that the present grievance is a mandatory subject of bargaining is a reasonably defensible interpretation of the statute.[2]

Waiver

We turn next to the Company's contention that the Union waived its right to bargain over the decision to relocate and subcontract. Specifically, the Company claims that the language of Article II, Section 2 of the collective bargaining agreement—the "Management Rights" clause—amounts to an unequivocal waiver of the Union's statutory right to bargain over work-transfer decisions such as the present one. The "Management Rights" clause provides:

> The Company will not transfer work customarily performed by members of the bargaining unit to another Company facility, or contract or subcontract out such work, except on the basis of unavailability

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[2] The Company's argument that the Board's decision should not be enforced because the Board failed to indicate which standard from *Otis Elevator*, 269 N.L.R.B. 891 (1984), it was relying upon is without merit. The Board reasoned that the claims were mandatory subjects of bargaining under any of the *Otis Elevator* standards. We agree.

> of trained personnel or necessary equipment, production requirements, or cost of manufacture or distribution. If such decision is based on the cost of manufacture or distribution, the Company will notify and discuss with the Union as soon as possible the reasons why it believes such action to be necessary, so that the parties may explore alternatives to such transfer of work.

At the outset, we note that national labor policy disfavors waivers of statutorily protected rights. *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). As such, only a "clear and unmistakable" waiver will be recognized by the courts. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *United Technologies Corp.*, 884 F.2d at 1575. Such a waiver may be express or implied, *see Metropolitan Edison*, 460 U.S. at 708 n. 12, and the parties' bargaining history may furnish evidence of an implied waiver. *See United Technologies Corp.*, 884 F.2d at 1575. The burden of proving a union waiver rests with the employer, and, due to the Board's expertise in these matters, its determination will be upheld if supported by substantial evidence. *See id.*

We do not believe that the contractual language in question indicates a clear waiver by the Union, and the Company certainly has not proven that a waiver was intended. As we read the language of Article II, Section 2, the Union intended to preserve its right to bargain, or—at the very least—did not intend to waive it.

The last sentence of Section 2 states that if a decision to subcontract or relocate "is based on the cost of manufacture or distribution, the Company will notify and discuss with the Union as soon as possible the reasons why it believes such action to be necessary, *so that the parties may explore alternatives to such transfer of work.*" (em-

phasis added). We agree with the Board that the duty of the Company to "notify and discuss" is linked to the exploration of alternatives to work transfers. It seems clear to us that Section 2 was intended to deal with the *decision* to relocate or subcontract not the *effects* of such a decision. This conclusion is reinforced when it is noted that the parties provided for the *effects* of a work transfer in Article II, Sections 3 and 4 of the collective bargaining agreement.

The question boils down to whether the phrase "notify and discuss" was intended to be synonymous with "negotiate" or "bargain". The Company vigorously asserts that the terms "negotiate" and "discuss" were clearly distinguished during the bargaining process. This, however, is not borne out by the evidence. Indeed, the evidence tends to show that these words were used interchangeably during negotiations. Also, we are not moved by the Company's attempt to distinguish these two terms by resort to the dictionary. "Discussions" are the nucleus of bargaining, and the Company has provided no evidence to convince us that the parties did not intend the contractually mandated "discussions" to amount to collective bargaining.

In a slight permutation of the same argument, the Company contends that the second sentence of the Management Rights clause requires only good-faith discussions with the Union. The Company claims that to read the last sentence as requiring full-blown negotiations effectively eliminates the latitude that the first sentence of Article II, Section 2 affords the Company in making work-transfer decisions based on the cost of manufacture or distribution. We disagree.

The first sentence of the Management Rights clause clearly can be read to prohibit all work transfers except those falling into certain designated categories. Reading it as such, the agreement gives the Company unfettered discretion to transfer work because of a lack of trained personnel, lack of necessary equipment or production

requirements, regardless of any possible statutorily imposed duty to bargain. Additionally, the agreement authorizes the Company to transfer work because of the "cost of manufacture or distribution," but in this situation the Company must comply with the obligation set forth in the second sentence of Section 2, *i.e.*, the obligation to bargain.[3]

We conclude, therefore, that the Company has not met its burden of establishing that the Union intended a blanket waiver of its statutorily guaranteed rights.

Failure to Bargain In Good Faith

The next question is whether the Company fulfilled its obligation to bargain to a genuine impasse.

An employer is not released from its obligation to bargain to a genuine impasse if "the employer has failed to bargain in good faith." *New York Printing Pressmen & Offset Workers Union No. 51 v. NLRB*, 538 F.2d 496, 501 (2d Cir. 1976). When an employer claims he cannot meet union labor costs, the Supreme Court has said that "a refusal to attempt to substantiate a claim of inability to pay . . . may support a finding of a failure to bargain in good faith." *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153 (1956).

An employer's obligation to provide information to a union extends to "all information necessary for the proper performance of its duties as the exclusive bargaining representative." *NLRB v. Pratt & Whitney Air Craft Div., United Technologies Corp.*, 789 F.2d 121, 130 (2d Cir. 1986). Such information may be relevant to a union's negotiation of a successor contract or "to the supervision of an existing agreement." *Id.*

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[3] We do not suggest, as did the ALJ, that the Company was required by this contractual provision to obtain the consent of the Union prior to embarking on its work-transfer plan.

It is clear here that the information requested by the Union was relevant to its obligation to enforce the existing agreement. Without the necessary data, the Union had no way to substantiate the Company's claims that it could no longer afford to do business in Connecticut. When dealing with such an integral aspect of labor-management relations, a union should not be required to accept a bald claim of economic hardship at face value. As the Supreme Court has stated: "If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Truitt Manufacturing*, 351 U.S. at 152-53.

The Company's claim that the demands of confidentiality prevented it from disclosing the requested information is not persuasive. True it is that an employer may sometimes refuse access to relevant information for reasons of confidentiality. *See e.g., Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Before recognizing such a right, however, the court must first determine that the union's right to relevant information is outweighed by the employer's legitimate claim to confidentiality. *Id.* at 314-15. The burden is on the employer to establish by more than conclusory assertions that relevant information should not be revealed to the union. *See Pratt & Whitney Aircraft Div.*, 789 F.2d at 130-31.

In this case, the Union assured the company that all financial data would remain confidential. There was no evidence of past disclosures of confidential information by the Union; and the Company proffered nothing more than its own surmise to demonstrate that some of its financial data might be divulged to outside sources.

We therefore agree with the Board that the Company's refusal to provide the financial records requested by the Union constituted a failure to bargain in good faith.

The Remedy

Finally, we must review the reasonableness of the Board-ordered remedy. Approaching this issue, we cannot turn a blind eye to the extensive administrative delay by the Board, and we believe that enforcement of the Board's remedy more than six years after the misconduct would truly "mock reality". *Emhart Industries, Hartford Division v. NLRB*, 907 F.2d 372, 380 (2d Cir. 1990).

Appropriate deference to the expertise of the Board in labor disputes implies that a remedy ordered by the Board is subject to limited judicial review. The Board's remedy will not be overturned " 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Fibreboard Paper Products*, 379 U.S. at 216 (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). Notwithstanding this limited scope of review, courts are authorized to refuse to enforce Board-ordered remedies when enforcement would be "unnecessary or futile." *NLRB v. W.A.D. Rentals Ltd.*, 919 F.2d 839, 841 (2d Cir. 1990); *see Emhart Industries*, 907 F.2d at 379 (court "must withhold enforcement of orders that will not effectuate any reasonable policy of the [A]ct even where the problems with the order are caused primarily by the lapse of time between the practices complained of and the remedy granted").

The remedy in an unfair labor practice case is often an order restoring the *status quo ante.* Elementary considerations of fairness, therefore, require that the remedy be implemented as soon after the transgression as possible. *Emhart Industries*, 907 F.2d at 378; *see NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966) (unfair labor practice remedy "must be speedy in order to be effective"). Protracted delay necessarily magnifies the

injury to displaced workers. It also increases the likelihood that the remedy imposed on the employer will become draconian. *See Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 67 (2d Cir. 1979) (court should not enforce Board orders that are "penal or confiscatory, rather than remedial"). In such situations, enforcement of the remedial action taken by the Board furthers no purpose of the Act. *See Emhart Industries*, 907 F.2d at 378-80.

We see no legitimate purpose to be served by the enforcement of the Board's remedy in this case. The Board's action punishes the Company for its decision to subcontract and relocate. But the wrong committed by the Company lay, not in its decision but in how it arrived at its decision, i.e., it reached the decision to subcontract and relocate *without first bargaining*. Thus, the appropriate remedy must be tailored to that wrong. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (the Act requires that "a proposed remedy be tailored to the unfair labor practice it is intended to redress").

In essence, the Board's order compensates union workers for the *effects* of the work transfer rather than for the unlawful *decision* to transfer work without bargaining. Such a remedy is improper here, however, because the affected bargaining-unit workers have already been compensated for the *effects* of the work-transfer decision by a contractual obligation entered into between the Company and the Union in conjunction with the successor collective bargaining agreement. At this juncture it would be draconian to force the Company—which has experienced a drastic change in its operations and personnel requirements—to comply with the Board's remedy. While we recognize that deterrence is a valid objective of Board-ordered remedies, an order, such as the present one, that becomes "penal or confiscatory" because of the Board's delay goes beyond any legitimate remedial purpose of the Act.

We might be expected to remand this case to the Board for further proceedings to impose a proper remedy. In light of the history of this case, however, we do not wish to return the parties to what has been aptly described as " 'a new dimension—one where time has little meaning.' " *Emhart Industries*, 907 F.2d at 378 (quoting House Committee on Government Operations, *Delay, Slowness in Decision Making, and the Case Backlog at the National Labor Relations Board*, H.R. Rep. No. 1141, 98th Cong., 2d Section 16 (1984)). It would be a grave injustice to prolong this matter. We therefore exercise our authority under Section 10(e) of the Act to modify the Board's remedy.[4] 29 U.S.C. § 160(e).

As previously stated, the wrong committed here was the refusal to bargain in good faith. The Board's back pay order requires that the Company pay bargaining unit workers back pay for the past six-plus years, and until that point in the future that they are either reinstated or obtain "substantially equivalent employment." This order is unreasonable because it assumes that, had the parties negotiated, those negotiations would have continued for six years, and possibly into the future. *See Sure-Tan*, 467 U.S. at 900 ("remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences") (emphasis in original); *cf. Carpenter Sprinklers*, 605 F.2d at 69 (Board's order not enforced where certain assumptions by the Board regarding the equity of its remedy were incorrect). We agree with the Company that the remedy should be limited to back pay for a reasonable period of time in which the parties should have bargained over the work transfer decision.

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[4] We agree with the Board's decision not to order the Company to return its operations to Connecticut as such an order would be unduly burdensome. *See Fibreboard*, 379 U.S. at 216, & n.10.

The circumstances of the present case indicate that, had the parties bargained over this, the process would have continued, at the longest, to the point when a new collective bargaining agreement was negotiated. At that point, any negotiations pertaining to the work-transfer decision would have merged into the negotiations for the new contract. As of March 23, 1985, the parties had a new contract which contained an agreement regarding the effects of the work-transfer decision. Therefore, any back-pay remedy that compensates employers beyond the date of the new contract would serve only to penalize the Company without promoting any legitimate purpose of the Act. Thus, back pay for all affected bargaining unit employees should end as of March 23, 1985.

Finally, reinstatement of all bargaining unit employees is also an unjust remedy here. In the years intervening between the Company's unfair labor practice and the Board's final remedy, the internal structure of the Company has changed to such a degree as to make reinstatement not only unreasonable but unrealistic. *See Fibreboard*, 379 U.S. at 216 & n.10 (unduly burdensome remedial order should not be enforced).

CONCLUSION

While we affirm the Board's determination that the Company committed an unfair labor practice, we reject the remedy imposed. The Board-ordered remedy not only fails to address the wrong to be remedied, but the Board's unreasonable and unexplained delay in reaching its decision results in a remedy that does not further any purpose of the Act.

Enforcement granted as modified.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 39-CA-2138-1
39-CA-2138-3

ROYTYPE DIVISION, TRIUMPH-ADLER-ROYAL, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 376, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On June 30, 1987, the National Labor Relations Board issued a decision in this proceeding finding that the Respondent violated Section 8(a)(5) and (1) of the Act, inter alia, implementing its decision to subcontract and relocate bargaining unit work without first bargaining to a bona fide impasse with the Union. The Board remanded the proceeding to the judge for the limited purpose of determining the appropriate remedies.[1]

On March 31, 1989, Administrative Law Judge Russell M. King Jr. issued the attached supplemental decision. The General Counsel and the Respondent filed exceptions

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[1] 284 NLRB 810 (1987). Member Devaney was not a member of the Board at the time of the issuance of the Board's original decision in this proceeding.

and supporting briefs,[2] the Charging Party filed cross-exceptions, and the General Counsel and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of exceptions, cross-exceptions, and briefs and has decided to affirm the judges rulings, findings,[3] and conclusions, as modified herein.[4]

We agree with the judge, based on the record before him, that an order requiring the Respondent to reestablish its operations in Newington, Connecticut, would be unduly burdensome under the circumstances of this case. As the judge found, for several years prior to the relocation, the Respondent has sustained substantial financial losses, and the relocation itself cost the Respondent in excess of $4 million. Although the General Counsel and the Charging Party contend that the cost of a return of the work to Connecticut would not reach that magnitude, we find that an order to return to Connecticut would impose an undue burden even if the expenses were somewhat reduced, especially in view of the necessity of major capital expenditures, the long passage of time since the

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[2] The General Counsel and the Charging Party have filed motions to strike certain attachments to the Respondents' briefs that allege the occurrence of additional facts since the close of the hearing, and the Respondent has filed a statement in opposition to the motions. In view of our affirmance of the judge's finding that reestablishment of the Respondent's operations is not appropriate, we find it unnecessary to rule on the motions.

[3] The expiration date of the bargaining agreement applicable at the time of the relocation was March 23, 1985, and not March 23, 1986, as the judge stated.

[4] The Respondent has requested oral argument. The request is denied as the record, exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

initial relocation, and the prospect of facing a renewal of the environmental concerns and problems that had previously affected its operation at Newington.[5]

Further, we find that a remedy, including backpay, that is tailored to the present rather than past circumstances better effectuates the purposes and policies of the Act than does the *Winn-Dixie* remedy ordered by the judge, which requires the Respondent to bargain over the previous decision to relocate its operations and to bargain over the reestablishment of operations in Connecticut, with associated backpay obligations.[6] Instead, as we recently ordered under similar circumstances in *Reece Corp.*, 294 NLRB No. 33 (May 31, 1989), we shall order the Respondent to offer Newington bargaining unit employees reinstatement to their former positions at the facilities to which the Respondent unlawfully transferred unit work, dismissinng, if necessary, any persons hired at those facilities. In addition, we shall order the Respondent to offer to pay employees travel and moving expenses. If there is insufficient work for all employees to be offered reinstatement, the Respondent shall place the names of those for whom work is not available on a preferential hiring list,

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[5] The Respondent had been found in violation of Connecticut's State Department of Environmental Protection (SDEP) standards after it had moved from West Hartford to Newington, and had an ongoing dispute with the Town of Newington over odors emitted from the plant, which included a pending lawsuit against it at the time it decided to relocate the Newington plant. See those portions of the judge's original decision, at 284 NLRB 813, 815, as well as fn. 7 of his supplemental decision. The Respondent contends that, if it returned to Newington, it would likely be faced with further legal battles in connection with its environmental problems, as well as substantial rises in costs to meet Connecticut's rigorous environmental standards. Testimony was offered in support of this contention. Although the Charging Party characterizes such testimony as speculation, the Respondent's past problems with the SDEP and Newington lend substance to the Respondent's concerns in these regards.

[6] See *Winn-Dixie Stores*, 147 NLRB 788 (1964).

in order of their seniority, and shall offer them jobs in the future before hiring other persons. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers.[7]

We also shall order the Respondent to make whole the Newington employees by paying them what they would have normally earned from the date of their termination to the date of the offer of reinstatement or, for the employees who decide not to relocate, until the date they secure substantially equivalent employment with other employers.[8] Backpay shall be based on the earnings that employees normally would have received during the applicable period less any net interim earnings, and shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded.*[9] Finally, because we have not ordered the Respondent to restore the status quo ante and bargain about its decision, we believe it is unnecessary to provide an affirmative order requiring the Respondent to furnish information it unlawfully withheld.

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[7] The Respondent contends that it is now impractical or inappropriate to offer reinstatement to employees formerly employed at its Connecticut facility because this relief was not sought until after the hearing on remand from the Board and because of changes in its operations and organizational structure, including the purported sale of the Respondent's assets to Olivetti Supplies, Inc. We shall leave consideration of these contentions to the compliance stage of this proceeding. We note, however, that under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), a purchaser having notice of pending unfair labor practice proceedings normally has a duty to remedy the predecessor's unfair labor practices.

[8] As the record establishes that the Respondent sold its wide film and fabric operations in May 1986, backpay for employees formerly employed in that portion of the Respondent's operations shall terminate as of the date of that sale. See *Eltec Corp.*, 286 NLRB 890 (1987). In determining the backpay amount due, the Respondent may offset any severance payment employees may have received.

[9] 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Roytype Division, Triumph-Adler-Royal, Inc., Newington, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, AFL-CIO as the exclusive representative of its employees in the appropriate unit set forth below, concerning the decision to subcontract bargaining unit work from its Newington, Connecticut facility and to relocate bargaining unit work permanently to other facilities. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks and quality control technicians employed [formerly] by Respondent at its Newington facility, excluding managerial employees, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

(b) Refusing to furnish the Union with information necessary for and relevant to its function as bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the Newington employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions at its

other facilities where the bargaining unit work has been relocated, with necessary traveling and moving expenses for them and their families and their household effects, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired at those facilities. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, the Respondent shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers.

(b) Make the Newington employees whole for any loss of earnings and other benefits suffered in the manner set forth in the remedy section of this supplemental decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail copies of the attached notice marked "Appendix" [10] to all the Respondent's employees who were employed at the Newington facility in the appropriate unit who were terminated or laid off as a result of the subcontracting and relocation of bargaining unit work.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. May 22, 1990

JAMES M. STEPHENS, Chairman

MARY MILLER CRACRAFT, Member

DENNIS M. DEVANEY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, AFL-CIO as the exclusive representative of our employees in the appropriate unit set forth below, concerning the decision to subcontract bargaining unit work and to relocate work permanently to other facilities. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks and quality control technicians employed [formerly] by us at our Newington facility, excluding managerial employees, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

WE WILL NOT refuse to furnish the Union with information necessary for and relevant to its function as bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the Newington, Connecticut employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent

positions at the other plants where the bargaining unit work has been relocated, with necessary traveling and moving expenses for them and their families and their household effects, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired at the other plants. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, we shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers.

WE WILL make the Newington, Connecticut employees whole, with interest, for any loss of earnings and other benefits suffered.

ROYTYPE DIVISION,
TRIUMPH-ADLER-ROYAL, INC.
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Commercial Plaza, 21st Floor, Hartford, Connecticut 06103-3599, Telephone 203—240—3373.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 39-CA-2138-1
39-CA-2138-3

ROYTYPE DIVISION, TRIUMPH-ADLER-ROYAL, INC.[1]
Respondent-Employer

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 376,
Charging Union

Michael A. Marcionese, Esq., and *Rita C. Lisko, Esq.*, of Hartford, CT, for the General Counsel.

Brian Clemow, Esq., and *Richard Mills, Esq* (*Shipman & Goodwin*), of Hartford, CT, for Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

RUSSELL M. KING, JR., Administrative Law Judge: These consolidated cases were first heard by me in Hartford, Connecticut in January 1985. On August 20, 1985,

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[1] The corporate name of the Respodent is again changed in accordance with a reorganization that occurred in 1986. Roytype is currently one of four divisions of Triumph-Adler-Royal, Inc., a Delaware corporation. Triumph-Adler-Royal, Inc. is a wholly-owned subsidiary of Triumph-Adler AG, a German corporation. Triumph-Adler AG is owned by Ing. C. Olivetti S.P.A. (ICO), an Italian corporation.

I issued my initial Decision in the case, wherein I found that the Respondent had engaged in certain unfair labor practices in violation of Section 8(a)(5) and 8(a)(3) of the National Labor Relations Act ("the Act"). The General Counsel and the Charging Union filed exceptions to the Board, and a motion to reopen the record to reconsider my recommended Remedy. On June 30, 1987, the Board issued its Decision and Order wherein it found that the Respondent had violated Section 8(a)(5) and (1) by refusing to bargain to a bona fide impasse before implementing its subcontracting and plant relocation proposals.[2] Citing the "unusual circumstances presented by the history of this proceeding", the Board granted the motion of the General Counsel and the Charging Union to reopen the record "for the limited purpose of determining the appropriate remedies in light of the relevant facts." In remanding the case, the Board further recited that "It is contemplated that the parties will include in their presentations facts relating to the hardship involved in transferring back to the Newington, Connecticut plant any of the unit work unilaterally subcontracted or relocated." In my original recommended Remedy, I had incorrectly assumed, from the evidence then presented, that by the time of the issuance of my initial Decision, the Newington, Connecticut plant would be closed down. Pursuant to the Board's remand, the record was reopened and additional evidence and testimony was presented in Hartford, Connecticut on November 3, 4 and 5, 1987. Thereafter,

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[2] The Board adopted my finding that the Respondent had failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by refusing to furnish certain financial information to the Union prior to the Respondent's plant closure. However, the Board failed to find that the Respondent violated Section 8(a)(3) and (1) of the Act, and also failed to find that the Respondent had engaged generally in a course of bad-faith bargaining. The Board determined that my findings "went beyond the issues litigated" regarding the Section 8(a)(3) violation, and "beyond the issues framed by the pleadings" relative to the general bad-faith bargaining.

the parties again filed briefs on the matter of an expanded remedy, which I had initially recommended to be only backpay from the date each employee was terminated, to run through May 23, 1986, the expiration date of the collective-bargaining agreement then in effect.

I. Brief History

The Union was certified by the Board as the collective-bargaining agent for the Respondent's production and maintenance employees on August 26, 1982. On March 24, 1983, the Respondent and the Union entered into a collective-bargaining agreement which provided for negotiations prior to the transferring or subcontracting out of any work customarily performed by members of the unit. The Respondent had been losing money for several years (approximately $6 million in 1982, $5 million in 1983, with a projected loss of almost $2 million in 1984). In November 1983 the Respondent held a meeting to inform the Union of its financial problems, indicating that it contemplated a reorganization plan. This plan, according to the Respondent, could include a wage freeze and the subcontracting or relocating of production work in order to reduce manufacturing costs. Thereafter, the Union requested extensive information from the Respondent regarding its manufacturing costs, some of which was provided, but much of which was not forthcoming from the Respondent. The withholding of this requested information was the basis of the complaint in this case. On April 9, 1984, the Respondent announced its intention to subcontract some of the unit work to a firm in Mexico, and to relocate the plant in a southeastern state (ultimately Georgia) to perform the balance and majority of the Respondent's manufacturing and distribution processes. During the summer of 1984, some work was in fact contracted out to a Texas company, and in November 1984, the first layoffs or terminations occurred. However, the last production employee was not terminated until July of 1986, and the actual plant building in New-

ington was not vacated until March 1987. During the removal process, the Respondent leased two facilities or buildings in Fort Valley, Georgia, one to be used as a manufacturing facility and the other to be used as a distribution facility. These facilities are currently being used for said purposes by the Respondent, and the balance of the original production work remains contracted out to a company in Del Rio, Texas, with actual production in Mexico.

The General Counsel and the Union argue that a proper remedy would be to relocate the Respondent's entire production, warehousing and distribution operations back to Newington, Connecticut, and offer former employees full reinstatement, together with appropriate backpay. The Respondent argues that such a remedy would be unduly burdensome and urges that my initial recommended remedy should remain the same. The findings and recommendations herein are based on the record as a whole, including the testimony and evidence adduced at the hearing after the Board's remand.[3]

II. Discussion of Expanded and Alternative Remedies

In the past, the Board has fashioned numerous different remedies in cases involving unilateral subcontracting, the elimination of product lines, and partial or total plant

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[3] The Charging Union was not represented by counsel at either of the hearings in this case. However, on the issue of an expanded remedy, a brief was submitted on behalf of the Union by Susan Price-Livingston, Esq., and Daniel E. Livingston, Esq., Kestell, Pogue & Gould, of Hartford, Connecticut. Additional briefs were also submitted by the General Counsel and counsel for the Respondent. All three briefs concerning the issues on remand were well-written, extensive and informative, and counsel are to be complimented on their briefs, all of which have been considered completely in rendering this Supplemental Decision. The witnesses who testified at the reopened hearing in November 1987 are hereby credited, there appearing to be no significant conflicts between their individual testimony. All new testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the entire record.

shutdowns resulting in the layoff or termination of employees. In the leading case of *Winn-Dixie Stores, Inc.*, 147 NLRB 788, 56 LRRM 1266 (1964), the respondent unilaterally eliminated its cheese packaging operation because of "economic disability" not involving any "pressing economic necessity" or an "emergency situation." While finding "no mitigating circumstances" which might have excused the respondent's actions, the Board refused a *status quo ante* remedy, stating as follows:

> The nature of the violation would justify us in directing the Respondent to restore the *status quo ante* by reestablishing the discontinued operation. However, we believe that our remedy should also be tempered by practical considerations. Reviewing the nature of the Respondent's general business operations, the likelihood that the affected employees are suitable for employment elsewhere in the Respondent's organization, and the possibility that the discontinued operation may now be outmoded, we are of the opinion that such reestablishment is not essential in this case to the moulding of a meaningful remedy suited to the practical needs of the situation before us. (Footnote omitted)

In *Winn-Dixie*, the Board ordered the respondent to bargain with the union concerning resumption of the discontinued operation, and if no agreement was reached, to bargain with the union concerning effects or discontinuance of the operation on employees in the unit.[4] The Board further ordered the respondent to pay backpay to the employees until the occurrence of any of the following conditions: (1) Reaching mutual agreement with the Union relating to the subjects which the Respondent is herein required to bargain about; (2) bargaining to a bona fide impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the

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[4] There is no issue in this case regarding "effects" bargaining.

Union; or (4) the failure of the Union to bargain thereafter in good faith. In *Avila Group, Inc.*, 218 NLRB 633, 89 LRRM 1364 (1975), the respondent made a unilateral decision to close down a warehouse and subcontract certain unit work for "sound economic reasons." Although the Board found there to be bad-faith bargaining, it did not require reopening of the warehouse in its remedy. In *National Family Opinion, Inc.*, 246 NLRB 521, 102 LRRM 1641 (1979), another "economically motivated" case citing *Winn-Dixie Stores, Inc., supra*, the respondent unilaterally closed down its printing department and discharged that department's employees. The Board found violations of Section 8(a)(3) and 8(a)(5) of the Act, but refused to grant a *status quo ante* remedy, in favor of a *Wnn-Dixie* type remedy, because the respondent was able to show that a *status quo ante* remedy would be unduly burdensome. The Board, however, commented as follows:

> . . . the basic asusmption underlying a full backpay remedy for an employer's failure to bargain over a decision to close is that, had the employer bargained with the union over the decision, a workable solution—however remote that possibility—might have been advanced which would have obviated the need to close. By disregarding its statutory obligation to bargain, however, this Respondent foreclosed, until now, meaningful discussion of the closing and precluded the possibility that an alternative to termination of the printing department might have been agreed upon. While we recognize that it is not certain that good-faith bargaining over the decision to close would have resulted in a decision different from the one unilaterally implemented by Respondent, the uncertainty must be taxed against the wrongdoer rather than against the innocent employees. (Footnotes omitted)

In *Weather Tamer, Inc.*, 253 NLRB 1090, 105 LRRM 1569 (1980), the respondent closed down a garment plant

which the Board found was merely an arm of its corporate owner. The Board found that the shutdown and the resulting layoffs were discriminatory in violation of Section 8(a)(3) and (1) of the Act, and not for lawful economic reasons. A *status quo ante* remedy was ordered in this case, the Board finding that the respondent failed to show that is "continued viability" would be endangered as a result of such a remedy. In another similar case, *Glenwood Management Corp.*, 287 NLRB No. 113, 127 LRRM 1306 (1987), the respondent discharged five employees and closed their department. After concluding that the discharges were discriminatory, the Board ordered a *status quo ante* remedy after finding that the respondent had not established that such a remedy would endanger its continued viability or be unduly burdensome. However, in *Arro Automotive Industries, Inc.*, 284 NLRB No. 57, 125 LRRM 188 (1987), no discriminatory conduct was found in the economically motivated decision by the respondent to close its plant. The Board refused to order a *status quo ante* remedy, citing economic motivation as the sole reason for the respondent's unilateral action, and a *Winn-Dixie* type remedy was ordered, citing *National Family Opinion, Inc., supra.*

In *Gulf States Manufacturers, Inc.*, 261 NLRB 852, 110 LRRM 1131 (1982), unilateral layoffs only were involved, with no plant closure. In finding a violation of Section 2(a)(5) only, the Board granted a partial *Winn-Dixie* type remedy, ordering backpay from the date of the layoffs to the date that the Respondent's obligation to bargain was met. In *Orange Data, Inc.*, 274 NLRB 1018, 118 LRRM 1441 (1985), the respondent unilaterally transferred work from its Missouri facility to its California facility, resulting in the discharge of employees. Without any discussion of economics, the Board found that the actions of the respondent were discriminatory in violation of Section 8(a)(3) and (1) of the Act, and also found a violation of Section 8(a)(5) and (1) of the

Act. The Board again ordered a *Winn-Dixie* type remedy, and additionally ordered the respondent to reinstate the employees "wherever located", with backpay and moving expenses. If reinstatement was declined, backpay was to continue until any declining employee obtained substantially equivalent employment. In *Griffith-Hope Co.*, 275 NLRB 487, 119 LRRM 1197 (1985), the respondent unilaterally subcontracted unit work for economic reasons, resulting in layoffs. Contrary to the administrative law judge, the Board did not find that the actions of the respondent were discriminatory in violation of Section 8(a)(3) and (1), relying on the fact that the judge had found no anti-union animus on the part of the respondent.[5] In its remedy, the Board ordered the respondent to terminate its subcontracts and to reinstate the subcontracted work at its plant, with offers of reinstatement to the employees who were laid off with appropriate backpay. In *Great Chinese American Sewing Co.*, 227 NLRB 1670, 95 LRRM 1594 (1977), the respondent unilaterally closed one of its facilities, resulting in employee layoffs. Although the Board found that there had been no radical change in the employer's economic circumstances, and that the respondent's actions were discriminatory in violation of Section 8(a)(3) and (1) of the Act, the Board nonetheless concluded that the reopening of the facility would cause economic hardship. Thus, the Board did not order a *status quo ante* remedy, finding that the policies of the Act would be sufficiently fulfilled by the issuance of a full make-whole order covering the employees of the terminated facility.[6]

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[5] In my original Decision, I in fact found anti-union animus on the part of the Respondent. Since the Board determined that my findings regarding discrimination violative of Section 8(a)(3) and (1), and my findings relative to a general course of bad-faith bargaining, went beyond the issues litigated and framed by the pleadings in this case, in my renewed considerations herein, I shall not consider the existence of any such anti-union animus in this case.

[6] See also, *Purolator Armored, Inc.*, 268 NLRB 1268, 116 LRRM 1269 (1984).

The Board has found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain to a bona fide impasses before implementing its subcontracting and plant relocation proposals. In this finding, the Board further concluded that the Respondent failed to supply necessary and relevant information needed by the Union to bargain, constituting a failure to bargain in good faith in violation of Section 8(a)(5) of the Act. I thus approach the subject of an expanded recommended remedy with these violations only in mind, without considering any conduct on the part of the Respondent to be discriminatory, or tantamount to a violation of Section 8(a)(3) and (1) of the Act.

In April 1984, the Respondent announced its intention to subcontract some of its work to a firm in Mexico, and to relocate the plant in a southeastern state. During the summer of 1984, some work was in fact contracted out to a Texas company, and in November 1984, the first layoffs or terminations occurred. The last production employee was terminated in July 1986, and the Newington plant was finally and completely vacated in March 1987. Since then, the Respondent has been in full production in Fort Valley, Georgia, and certain production work remains contracted out to a Texas company, with actual production in Mexico. For several years prior to its move, the Respondent had sustained substantial financial losses in Newington, due to a multitude of reasons.[7] The evidence reflects that it cost the Respondent in excess of $4 million to remove its production and distribution activities to Georgia, and to subcontract a certain amount of its production work to Texas.[8] After considering all

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[7] Included in these problems were environmental difficulties, due to the Respondent's manufacturing process.

[8] The Respondent's moving and subcontracting costs were to be prepared by John F. Tarantino, the Director of Corporate Audit of Triumph-Adler-Royal, Inc., subsequent to the remand hearing. Tarantino testified extensively at the remand hearing. This was ac-

of the testimony and evidence in this case, including the testimony and evidence of record which was produced and given on remand, I find that to require the Respondent to relocate back to Newington any one or all of its manufacturing operations, or its distribution operation, would be unduly burdensome on the Respondent, as that term has been traditionally used and defined by the Board.

Expanded Remedy

Considering the foregoing, and since the Respondent's plant removal and subcontracting were economically motivated, and its conduct and actions have not been found to be discriminatory, I do not find that, in the circumstances of this case, the Respondent should be required to reopen its closed operations. I further find that such

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complished, and the figures were then reduced to a written summary and delivered to counsel for the General Counsel, who in turn verified the summarized figures with those contained in the Respondent's audited general ledger. The verification process, including its dates and times, were made known to a representative from the Union, who had the option to be present. At the end of the verification process, the summary itself was to be marked as Respondent's Exhibit Q(R), and without objection from counsel for the General Counsel, the exhibit was to be submitted and admitted into evidence after the remand hearing was adjourned. During the hearing, the Union objected ot this procedure, which objection was overruled. Thereafter, the exhibit was prepared, verified and forwarded for admittance into evidence, the record having been held open for that purpose. The Union continued to object to the above procedure, and to the admittance into evidence of the exhibit. The Union further moved to reopen the record a third time to present its own evidence regarding the figures and calculations in the exhibit. I have reconsidered the entire post-hearing procedure established during the remand hearing, the Union's objections to the procedure and to the exhibit, and I have also considered the Union's motion to reopen the record. The Union's objections to the exhibit are again and hereby denied, and Respondent's Exhibit Q(R) is hereby admitted into evidence, and the record is hereby closed. Additionally, the Union's motion to reopen the record to submit further evidence or argument regarding the exhibit is also hereby denied.

an order here is necessary to effectuate the policies of the Act. Thus, instead of requiring the Respondent to reopen a financially unprofitable operation, requiring the expenditure of substantial sums of money, I conclude that the Respondent's unfair labor practices will be sufficiently remedied by an expanded and full make-whole order covering the employees of the closed facility. I shall recommend a *Winn-Dixie* type of remedy, modified and tailored to conform to the circumstances of this case.[9] In order to recreate as nearly as possible the situation that existed at the time the Respondent should have bargained, and to make whole all employees in the unit for any loss of pay suffered as a result of the Respondent's subcontracting and plant closure, I shall recommend that the Respondent be ordered to pay said employees, as of the date of their respective terminations, their normal wage rates, until the earliest of the following conditions are met: (1) mutual agreement is reached with the Union relating to the Respondent's decision to subcontract certain work and to close the Newington, Connecticut facility; (2) good-faith bargaining results in a bona fide impasse; (3) the failure of the Union to request and commence negotiations within 20 days of the receipt of the Respondent's notice of its desire to bargain with the Union/ or (4) the subsequent failure of the Union to bargain in good gaith. Implicit in the above is the Respondent's actual good-faith bargaining with the Union, and to these ends, the Respondent will be so ordered to commence said bargaining immediately upon the Union's affirmative response to the Respondent's notice of its desire to bargain. If the Respondent decides to resume one or more of its operations in Newington, and offers to reinstate the appropriate employees to their same or substantially equivalent positions, its liability as to these employees will cease as of that date. Backpay shall be

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[9] The General Counsel has requested a "visitorial" provision in the remedial order. Upon due consideration, that request is hereby denied.

based on the earnings which the employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, 26 LRRM 1185 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB No. 181, 125 LRRM 1127 (1987).[10] I shall further recommend that the Respondent be ordered to mail a copy of an appropriate notice to the last known address of all former unit employees who were terminated as a result of the Respondent's subcontracting or plant closure. Upon completion of such mailing, I shall recommend that the Company be ordered to submit to the Regional Director a list of the names and addresses of the employees to whom the notices were mailed.

Upon the earlier affirmed findings of fact and conclusions of law, upon the Board's Decision and Order of Remand, upon the foregoing discussions, findings and conclusions regarding an expanded remedy, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

MODIFIED ORDER[11]

The Respondent, Roytype Division, Triumph-Alder-Royal, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively and in good faith with International Union, United Automobile, Aerospace

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[10] Regarding interest on backpay due prior to the Board's holding in *New Horizons*, said interest shall be computed as directed by the Board's holdings then in effect.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and Agricultural Implement Workers of America, UAW, Local 376, as the exclusive representative of its employees in the appropriate unit set forth below, concerning the decision to subcontract certain unit work to the State of Texas and to relocate the balance of said unit production and distribution work permanently to its Fort Valley, Georgia, facilities. The appropriate unit is:

> All full-time an dregular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks and quality control technicians employed [formerly] by Respondent at its Newington facility, excluding managerial employees, office clerical employees and guards professional employees and supervisors as defined by the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit with respect to the decision to close the Newington, Connecticut plant and subcontract work to Texas, and transfer work to new facilities in Fort Valley, Georgia, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay the terminated Newington plant employees their normal wages in the manner and for the period set forth in the Expanded Remedy section of this Supplemental Decision.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other rec-

ords necessary to facilitate the determination of the amount of backpay due each of the terminated Newington plant employees.

(d) Mail copies of the attached notice marked "Appendix" to all the Respondent's employees formerly employed at its Newington plant in the appropriate unit at the time said employees were terminated by virtue of the subcontracting of certain work, or by virtue of the Newington plant closure.[12] Upon completion of such mailing, the Respondent shall forwith submit to the Regional Director of Region 34 a list of the names and addresses of the employees to whom the notices were mailed, together with a certification, signed by an authorized employer representative, that the Respondent has completed the mailing in accordance with the terms of this Order.

(e) Notify the Regional Director of Region 34 in writing within 20 days from the date of this Order what steps the respondent has taken to comply herewith.

Dated, Washington, D.C. March 31, 1989

/s/ Russell M. King, Jr.
RUSSELL M. KING, JR.
Administrative Law Judge

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[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail a copy of this notice to all employees who were employed by us at our Newington, Connecticut plant during the period of from 1984 to 1987, when said plant was closed.

WE WILL NOT refuse to bargain collectively and in good faith with INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 376, as the exclusive representative of our employees in the appropriate unit set forth below, concerning the decision to subcontract certain work and to close the Newington plant and relocate work to our Fort Valley, Georgia plant. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks, and quality control technicians employed (formerly) by Respondent at its Newington facility, excluding managerial employees, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative of all

employees in the above-described appropriate unit with respect to our decision to close the Newington, Connecticut plant and transfer the work to our Fort Valley, Georgia plant, or subcontract certain work to a Texas company, including any disputes with respect to the effectuation of the remedy set forth in the Supplemental Decision and Order of the National Labor Relations Board, and, if an understanding is reached, embody it in a signed agreement.

WE WILL pay the terminated Newington, Connecticut plant employees their normal wages in the manner and for the period required by the Supplemental Decision and Order of the National Labor Relations Board.

ROYTYPE DIVISION,
TRIUMPH-ADLER-ROYAL, INC.
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Commercial Plaza—21st Floor, Hartford, Connecticut 06103-3599, Telephone (203) 240-3373.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 39-CA-2138-1
39-CA-2138-3

ROYTYPE DIVISION, PERTEC COMPUTER CORPORATION, A WHOLLY OWNED SUBSIDIARY OF TRIUMPH-ADLER NORTH AMERICA, INC.[1]

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 376

DECISION AND ORDER REMANDING

On 20 August 1985 Administrative Law Judge Russell M. King Jr. issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions supporting briefs, and answering briefs, and the General Counsel and the Charging Party filed motions to reopen the record which the Respondent opposed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

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[1] The corporate name of the Respondent is changed in accordance with the parties' posthearing stipulation. In light of that stipulation it is unnecessary to further amend the complaint to reflect the change in corporate name.

affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel and the Respondent agree that the judge's finding of a contractual restriction on the Respondent's relocating or subcontracting bargaining unit work without obtaining the Union's consent, and his finding that the Respondent violated Section 8(a)(3) of the Act by relocating and subcontracting unit work, went beyond the issues litigated here. We agree that the judge erred in reaching these issues and we do not adopt those findings.

However, we agree with the judge's finding that the contractual arrangement between the Respondent and the Union for dealing with decisions to transfer or contract out unit work does not waive the Respondent's statutory obligation for decision bargaining over those subjects under the circumstances here. In addition to the reasons set forth by the judge in rejecting the Respondent's waiver contention, we note that the agreement to "notify and discuss with the Union as soon as possible the reasons why it believes such action to be necessary" is expressly linked to the purpose of "explor-[ing] alternatives to such transfer of work." Furthermore, the contract also covers, in separate sections, the subjects of job retention and severance pay in the event unit work is transferred. Thus, the parties appear to have provided for bargaining over the decision to transfer (if based on manufacturing costs) and to have settled in advance certain subjects of "effects" bargaining if, after "decision" bargaining, the transfer is implemented. This contractual arrangement contrasts sharply with that in *National Metalcrafters*, 276 NLRB 90 (1985), remanded sub nom. *Auto Workers Local 449 v. NLRB*, 802 F.2d 969 (7th Cir. 1986), on which the Respondent relies, where the Board found a waiver of any obligation to bargain over decisions to relocate unit work. There, the employer had contracted to "discuss such relocation

in advance and to negotiate with the Union concerning the effect of such relocation on employees." The Board noted that the clause on its face drew a distinction between the limited undertaking to "discuss" relocation and the obligation to "negotiate" concerning the effects of the decision. Further, the Board found that the parties' bargaining history and other contractual provisions corroborated their intent to distinguish between decision discussions and effects negotiations. Id., 276 NLRB at 91.[2] None of those factors is present in the instant case and we see no basis on which to conclude that there was a clear and unmistakable waiver of the statutory right to bargain. See *Park-Ohio Industries*, 257 NLRB 413 (1981), enfd. 702 F.2d 624 (6th Cir. 1983).

Absent a waiver, we find, in agreement with the judge, that in the circumstances of this case, the Respondent's decision to relocate was a mandatory subject of bargaining. We also agree with the judge's conclusion that the Respondent's decision to subcontract part of its operation to Mexico was a mandatory subject. Our reasons are as follows. Each step of the transfer out of work that had been performed by bargaining unit employees was motivated by the results of a consultant's cost study, which projected potential savings in manufacturing costs of

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[2] In remanding the case, the Seventh Circuit did not fault the Board for the various factors to which it had looked, but indicated that heavy reliance on supposed "plain meaning" of particular words is perilous, especially when such language is relied on for the purpose of establishing a waiver of statutory rights. The court emphasized the well-settled rule that the burden is on the party asserting waiver and that such a waiver must be shown to be clear and unmistakable, and it remanded the case because, in its view, the Board had not explained whether it was deliberately abandoning that principle and if so, why. *Auto Workers Local 449 v. NLRB*, supra, 802 F.2d at 973-974. We have not, in fact, abandoned that principle, which has been expressly approved by the Supreme Court (*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983)); and it supports our conclusion here that the Respondent has not made a sufficient showing of waiver by the Union.

$2.6 million annually, $2 million of which was attributed to labor costs. The primacy of labor costs in the decision to shift work out of the plant is not seriously disputed.[3] Nor is there substance to the Respondent's contention that the transfer of bargaining unit work altered the Company's basic operation. Rather, as did the employer in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the Respondent continued its previous business of manufacturing and distributing typewriter ribbons and cartridges. Part of the manufacturing function continued to be performed by employees of the Respondent, newly hired at new locations, and part was subcontracted to a Mexican manufacturer. But there was neither a liquidation of the enterprise, in whole or part, nor a fundamental change in its nature. Thus, the Respondent has failed to show that it changed either the products, the manufacturing process, or the technology of production. Rather, the transfers of work resulted in what was essentially the same work being done for the Employer by other employees in different locations. Compare *Inland Steel Container Corp.*, 275 NLRB 929 fn. 1, 935-936 (1985) (relocation decision not a mandatory subject of bargaining because it was principally based on need to replace antiquated plant facilities). While the Respondent encum-

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[3] In fact, the Respondent argues that the labor cost differential is so great that bargaining would be pointless because the Union would never agree to wage cuts substantial enough to make reversal of the decision economically sound. But, while wo do not say that the futility of bargaining need be an irrelevant consideration, the Respondent's bare assertion of it is, on these facts, insufficient. For if determinations of whether a subject is one on which bargaining is mandatory depended on the subjective predisposition of the parties to reach agreement, the statutory duty to bargain would have no vitality. Indeed, to conclude in advance of bargaining that no agreement is possible is the antithesis of the Act's objective of channeling differences, however profound, into a process that promises at least the hope of mutual agreement. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). On the other hand, once bargaining to impasse has occurred, the futility of continuing is clear. Also see *NLRB v. Katz*, 369 U.S. 736 (1962).

bered itself with moving costs, it has not shown that the transfer of work was accompanied by major shifts in capital investment. Likewise, the Respondent has not shown that bargaining to impasse or agreement over the decision would have jeopardized its business in any way. For all these reasons, our conclusion that the Respondent was obligated to bargain over the subcontracting and relocation decisions is consistent with the Supreme Court's opinion in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and with any of the views expressed in the Board's decision in *Otis Elevator Co.*, 269 NLRB 891 (1984).[4]

We also agree with the judge that the information requested by the Union, consisting of a cost study, substantiating financial records, and data on recent subcontracting, was relevant to the negotiation of concessions to meet the Respondent's proposals to transfer unit work and to the processing of contractual grievances concerning those transfers. The Respondent's financial circumstances were, by its own admission, central to its decision to relocate its operations, and it had had the cost study prepared for precisely that reason. In order to bargain

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[4] Since the Respondent's subcontracting and relocation decisions turned on labor costs, Chairman Dotson finds, under the plurality opinion in *Otis Elevator Co.*, 269 NLRB 891 (1984), that the decisions constituted mandatory subjects of bargaining.

In agreeing with his colleagues that the Union did not waive by contract language its statutory right to bargain over the subcontracting and relocation decisions, Chairman Dotson finds the instant case distinguishable from *Litton Systems*, 283 NLRB No. 144 (May 15, 1987), in which he dissented. In *Litton*, the Chairman found, in agreement with the judge, that the broad management rights clause in the parties' collective-bargaining agreement, along with the Union's past practice in dealing with work relocation and the union business representative's comments during negotiations, permitted the employer's unilateral relocation of unit work. By contrast, in this case the contractual language in fact contemplated bargaining over transfers of work and the evidence was insufficient to establish that the Union by its past conduct waived its bargaining rights over such transfers.

intelligently over what labor cost concessions it might make that could obviate the relocation, the Union needed to know the relative proportion of those costs in the Respondent's overall operation. The Respondent did not meet its obligation under Section 8(a)(5) through its grudging and belated offer to allow the Union's financial analyst to look at the cost study on its premises, but not to allow him to take with him a copy for further analysis or to examine the study's numerous and complex figures in light of the financial records from which they were derived.[5] Finally, the Respondent's confidentiality claim establishes no defense, for even assuming the Respondent could show that its internal financial information is confidential as to competitors, it has not shown why it could not have supplied the information to the Union's financial analyst under an agreement that the information would be used only by the analyst and would not be disseminated. The Union offered such assurances, and the Respondent has not shown the Union to be unreliable in respecting

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[5] The Respondent also breached its statutory obligation by failing to supply the Union with the subcontracting information it had requested. The Union was not required simply to accept the Respondent's assurances that all subcontracting had satisfied the contractual conditions for permitting it to contract out unit work. Further, as the judge correctly noted, the fact that the Union might have tolerated subcontracting without question in the past did not constitute a waiver of its right to inquire into that subject when circumstances changed.

Our holdings here as to both the financial data and the subcontracting information are not inconsistent with our decision in *Buffalo Concrete*, 276 NLRB 839 (1985), enfd. 803 F.2d 1333 (4th Cir. 1986), which holds only that an employer's claim that its contract offers are based on a need to remain "competitive" does not automatically entitle a union to see all of the employer's financial books. Accord: *Harvstone Mfg. Corp. v. NLRB*, 785 F.2d 570, 576-577 (7th Cir. 1986). In the present case, the information sought by the Union was closely related to concrete concerns over loss of unit work through subcontracting and the projected plant relocation, and it was plainly necessary for evaluating the Respondent's claims concerning those subjects in negotiations.

confidentiality agreements. If the Respondent's broad assertion of confidentiality were to prevail here, unions would rarely be held entitled to any information that employers had reason to withhold from third parties. Therefore we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish information.[6]

In light of the Respondent's withholding of substantial and necessary information from the Union, the judge was correct in finding that the Respondent did not bargain to impasse over the subcontracting and plant relocation decisions. The parties met and discussed these proposals several times (at meetings the Respondent never conceded to be negotiating sessions), but the refusal of the cost information prevented a full exploration of the subjects on which the Union would have had to concede in order to present useful alternatives to transferring the work out. A failure to supply information relevant and necessary to bargain constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances. *Harvstone Mfg. Corp.*, 272 NLRB 939, 944 (1984), enf. denied on other grounds 785 F.2d 570 (7th Cir. 1986). See generally *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) (prior good faith of the parties is relevant to question whether impasse exists). Therefore, we adopt the judge's finding without having to pass on his subsidiary finding that the Respondent engaged generally in a course of bad-faith bargaining, a finding which goes beyond the issues framed by the pleadings.

Given the Respondent's mandatory bargaining obligation, it violated Section 8(a)(5) and (1) by refusing to

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[6] In the absence of exceptions, Chairman Dotson adopts the judge's conclusion that it is inappropriate to defer the information request issue to the contractual grievance-arbitration process.

bargain to a bona fide impasse before implementing its subcontracting and plant relocation proposals.

Amended Conclusions of Law

Substitute the following for the judge's Conclusion of Law 4.

"4. That the Respondent Employer violated Section 8 (a) (5) and (1) of the Act by implementing its decision to subcontract and relocate bargaining unit work without first bargaining to a bona fide impasse with the Union."

The Remedy

The General Counsel and the Charging Party contend, and the Respondent does not appear to dispute, that the judge erred in assuming that by the time he issued his decision the Newington, Connecticut plant from which all the disputed work was transferred had, for all relevant purposes, closed down. This assumption, in turn, led the judge to deny most of the remedial measures sought by the General Counsel. In the unusual circumstances presented by the history of this proceeding we shall grant the motion filed by the General Counsel and the Charging Party to reopen the record for the limited purpose of determining the appropriate remedies in light of the relevant facts. It is contemplated that the parties will include in their presentations facts relating to the hardship involved in transferring back to the Newington, Connecticut plant any of the unit work unilaterally subcontracted or relocated. In making his recommendations as to remedy, the judge should consider the applicability of such cases as *Griffith Hope Co.*, 275 NLRB 487 (1985); *Orange Data, Inc.*, 275 NLRB 1018, 1020—1020 (1985); *Gulf States Mfrs., Inc.*, 261 NLRB 852 (1982) (remedy modified 271 NLRB 772 (1984)); and *National Family Opinion, Inc.*, 246 NLRB 521 (1979).

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 39-CA-2138-1
39-CA-2138-3

ROYTYPE DIVISION, ROYAL BUSINESS MACHINES, INC.,
Respondent-Employer

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 376,
Charging Union

Michael A. Marcionese, Esq., of Hartford, Ct, for the General Counsel.

Brian Clemow, Esq. (Shipman & Goodwin), of Hartford, CT, for the Respondent Employer.

DECISION

Statement of the Case

RUSSELL M. KING, JR., Administrative Law Judge: These consolidated cases were heard by me in Hartford, Connecticut on 28 January through 1 February 1985. The underlying charges were filed on 18 April 1984 by International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW),

Local 376 (the "union").[1] The complaint was issued on 24 July 1984 by the Officer-In-Charge for Sub-Region 39 of the National Labor Relations Board (the "Board") on behalf of the Board's General Counsel.[2] The complaint was also amended on 20 November 1984, and once during the hearing.

The complaint alleges in effect that Roytype Division, Royal Business Machines, Inc. (the "company"), during the term of a collective-bargaining agreement (the "contract") between the parties and since 10 April 1984, has discriminated against its employees and failed to bargain in good faith by refusing to furnish certain necessary and relevant information to the union to enable it to carry out its obligation to the employees, all in violation of Sections 8(a)(1), (3) and (5) of the Act. On 10 April 1984 the company notified its employees of its intention to permanently relocate and subcontract all unit work at its Newington, Connecticut plant to North Carolina or Georgia, and Mexico.[3]

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[1] Robert Madore, the union's secretary-treasurer, was present throughout the hearing and also testified in the case.

[2] The term "General Counsel," when used herein, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

[3] The pertinent parts of the Act (29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer —(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . (5) to refuse to bargain collectively with the representative of employees. . . .
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> * * *
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> Sec. 7. Employees shall have the right to self-organization, to form, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

The company, in its answer, denied that it violated the Act in any manner and defends the complaint on four grounds as follows. The company alleges that the decision to relocate was not a mandatory subject of bargaining, that the union contractually waived its right to bargain over the relocation, that the parties did bargain, and to impasse, and that any issue existing between the parties be deferred to arbitration.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and counsel for the company,[4] I make the following:

Findings of Fact[5]

I. Jurisdiction

The pleadings, admissions and evidence in the case establish the following jurisdictional facts. Prior to 21 May 1984 Roytype, with an office and place of business in Newington, Connecticut, was a division of Royal Business Machines, Inc., a Nevada corporation, which is a

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[4] I deem it necessary and appropriate to herein credit my law clerk, Lance G. Binkley, for his insight and research in the preparation of this Decision.

[5] The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

wholly-owned subsidiary of Triumph-Adler North America, Inc. ("TANA"), a New York corporation.[6] The composition of the Board of Directors of both corporations was identical. On or about 21 May 1984, as part of a corporate reorganization, the company became a division of Pertec Computer Corporation, a Delaware corporation, which is wholly-owned subsidiary of T/A Systems, Inc., also a Delaware corporation and also a wholly-owned subsidiary of TANA. At all times, the composition of the Board of Directors of all three corporations has been identical. The re-alignment of the the company resulted in no change in the officers of the company, nor in the nature of its business. At all times before and after this change, the company has reported directly to the board of directors of TANA. The company is engaged in manufacturing and distributing typewriter ribbons and cartridges. During the 12-month period immediately preceding the issuance of the complaint herein, the company, in the course and conduct of its business operations, purchased and received goods and materials in excess of $50,000 which were shipped to its Newington, Connecticut facility directly from points outside the State of Connecticut. Thus I find, as alleged and admitted, that the company is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Also as alleged and admitted, I find that the union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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[6] The parties entered into a post-hearing stipulation regarding the rather complex makeup of the company, and dealing with matters of jurisdiction. As requested by the parties, the record is reopened for the acceptance of that stipulation as evidence in the case.

II. The Alleged Unfair Labor Practices

A. *Background and Initial Facts*

The company moved its manufacturing operations from West Hartford to Newington, Connecticut in 1982 in order to reduce labor costs and improve manufacturing and distribution efficiency. At the new plant the company was found to be in violation of the State Department of Environmental Protection ("State DEP") standards, resulting in "unfavorable publicity" and a lawsuit by the Town of Newington to revoke company's temporary operating permit. On 26 August 1982 the union was certified by the Board as the collective-bargaining agent for the company's production and maintenance employees (the "unit"). The parties began contract negotiations in October 1982, reaching agreement on 24 March 1983. Article II, Section 2 of the contract, effective as of 28 March 1983, provides:

> The Company will not transfer work customarily performed by members of the bargaining unit to another Company facility, or contract or subcontract out such work, except on the basis of unavailability of trained personnel or necessary equipment, production requirements, or cost of manufacture or distribution. If such decision is based on the cost of manufacture or distribution, *the Company will notify and discuss with the Union as soon as possible the reasons why it believes such action to be necessary, so that the parties may explore alternatives to such transfer of work.* [Emphasis added.]

During negotiations and on 3 November 1982, the company initially proposed contract language to allow unilateral relocation and subcontracting of unit work without consent by the union. Following a series of meetings between union president Philip Wheeler and the company's representative, attorney Brian Clemow, agreement was reached concerning the language of Article II, Section 2 of the contract (recited above) on 23 March

1983. There is conflicting testimony as to whether the union or the company submitted the proposal for modifications resulting in the term "notify and discuss" in the contract.

In mid-1983, the company's chief executive officer was replaced by James Snider, who determined the need to drastically reduce the company's costs in order to correct financial losses. According to Snider, the company had lost 6.6 million dollars in 1982 and 2.9 million as of mid-1983. Snider's program for cost reduction included closing warehouses, improving communications, reducing the industrial relations staff, new equipment, and a pay-freeze for salaried personnel. On 31 August 1983 Snider and attorney Clemow met with union president Wheeler. According to Snider's testimony, they discussed changing the incentive system in order to turn the company around financially. Wheeler denied that manufacturing costs were discussed at the meeting.

The parties held a series of meetings beginning on 21 November 1983 at the company's Newington plant. The company was usually represented by Snider, attorney Clemow, and industrial relations manager Conley. In attendance for the union was union president Wheeler and secretary-treasurer Robert Madore. On 21 November 1983 the company held a meeting to inform the union of its financial problems and the "impact on the labor relation's picture." Attorney Clemow opened the meeting by stating that the meeting was *not* a negotiating session. Company president Snider then took over and informed Wheeler that he was presenting a reorganization plan to TANA and that if negotiations became necessary he would contact the union. Using overhead slides, Snider presented a report alleging company losses of 6.6 million dollars in 1982, 5 million dollars in 1983, and a projected loss of 1.9 million dollars for 1984. Snider reviewed steps the company had taken to streamline all areas other than the bargaining unit and its employees.

Snider then informed the union that the company had conducted a wage survey of bargaining unit jobs in the industry, which reflected the company's wages to be higher than those of its competitors. Snider also testified he informed the union that the company had hired outside consultants to study the cost of manufacturing its products at other locations which showed potential savings by manufacturing outside the country. Snider discussed a wage freeze for unit employees, and subcontracting or relocating production work as changes necessary if the company could not substantially reduce manufacturing cost. However, Wheeler testified that Snider did not inform the union about the cost study, did not disclose the identity of the consultants, and did not mention information obtained from them. Furthermore, according to Wheeler, Snider did not express any intent to move the plant, but wanted to resolve problems and remain in Newington.[7] At the 21 November meeting Wheeler requested the opportunity to have a union expert from Detroit visit the plant to see the company's books. Wheeler also requested a copy of the information presented. The company sent the union the presentation slides in a letter dated 23 November 1983. On 30 November 1983, Wheeler sent a letter to the company requesting access to its original financial records to verify the company's claim of economic hardship, and to prepare for possible concession negotiations. This request was a three-page typewritten letter which, in effect, required the company to expose every financial document over a three-year period, and also requested the company to summarize information in nine specific areas.

After the meeting of 21 November, the union learned from its shop chairman that the company had subcontracted out unit work. On 8 December 1983 the union

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[7] Wheeler testified that after the meeting Clemow said that it certainly was not the company's intention to subcontract or relocate, but to solve the problems in Newington. Wheeler further testified that Clemow said a solution was possible based on the success of changes already effected.

filed a grievance and requested information concerning any subcontracting during the last six-month period.[8] Apparently in response to Wheeler's extensive letter of 30 November 1983, on 18 January the company mailed a packet containing some of the requested information to UAW headquarters in Detroit. The union's financial analyst from Detroit, Gerald Lazarowitz, testified that the information consisted of *summaries* of internal documents which were inadequate to verify the company's claim of losses.[9] In a letter dated 17 February, Lazarowitz asked the company's industrial representative Russ Booth for full access to financial records and a copy of "a study which purported to prove that the company could save substantial sums of money by subcontracting work." The letter also indicated, and Lazarowitz so testified, that he had contacted the company's controller Edward Baroody, who had been assigned to gather the requested information, and that Baroody indicated full access to financial records would not be forthcoming. Baroody later informed Lazarowitz that the union could only receive summaries of the information contained in actual company records.[10]

On 21 February, Snider held a second meeting, for the purpose of discussing "cost of manufacturing" under Article II, Section 2 of the contract. Snider presented re-

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[8] All dates hereinafter refer to the year 1984 unless otherwise indicated.

[9] Lazarowitz, a staff member from the research department in Detroit, indicated he spent about 75 percent of his time conducting such analyses to verify employers' claims that they cannot meet their financial responsibilities under union contracts.

[10] According to Lazarowitz, Baroody told him in a telephone conversation that a visit to the plant would be a waste of time, and there was no way the union could make enough concessions to avoid relocating unit work. However, Baroody testified that it was Lazarowitz who told him, in a telephone conversation in mid-February, that it would probably be a waste of time to visit the plant, and that he (Baroody) agreed with the comment.

sults of the manufacturing cost study, reflecting more profit through subcontracting and relocating the business. He introduced a three-part plant closing plan to subcontract narrow film to Mexico (phase A), to relocate fabric inking and assembly to a right-to-work state (phase B), and to relocate the remainder of production operations to a "low-cost manufacturing area" in the South (phase C). According to Snider, factors which led the company to consider relocating were high wages, fringe benefits, low productivity, and the dispute with the Town of Newington over odors emitted from the plant, which included the pending lawsuit filed by the Town against the company. Snider informed Wheeler that he had to make a final recommendation concerning relocation at the 21 March TANA Board meeting. Snider also asked Wheeler for suggestions on how the company could stay in Newington, adding that he couldn't see how it could be done. Wheeler told Snider that the union had come to the meeting expecting to negotiate concessions, and now the company was telling the union it was going to move. Wheeler repeated the union's request for financial information, adding that copies of the cost studies were also necessary to bargain about alternatives to subcontracting and relocating. Wheeler protested that Snider's 21 March deadline to decide whether to relocate did not give the union adequate notice to bargain, particularly since not all necessary information had been furnished.[11] After considerable discussion, Snider changed his position, and agreed to allow Lazarowitz to vist the company's plant. Snider said the company would give Lazarowitz "the information he needed," but not a copy of the consultants' studies.

During a telephone conversation on 22 February Lawarowitz asked Baroody for information, presumably to be

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[11] In a letter to Snider dated 20 March, Wheeler characterized the time frame as bad-faith bargaining, allowing the union very little time to analyze the proposal and discuss alternatives.

made available during his visit to the plant.[12] On 1 March, after rescheduling other appointments, Lazarowitz arrived at the company's facility at 12:30 p.m. Snider informed Lazarowitz that the company was not making a 'poverty plea" and, therefore, the union could *not* have access to actual financial records.[13] However, the company did give Lazarowitz some of the information requested on 22 February. Lazarowitz was shown the 43 page consultant's cost study, but was not permitted to leave with a copy of the actual study, Snider indicating that the company had a right to confidentiality. Snider also provided Lazarowitz with more summary pages from the study, and offered to allow him to stay as long as necessary, at the company's expense, to analyze the study.[14] Lazarowitz testified that he would need one to two weeks to complete a full evaluation of the cost study, but that he left the plant at 3:30 p.m. to conduct audits he was unable to reschedule.[15] There is no indication in the record to show why the union did not send additional research experts to the company's facility. However, the record is clear that the company was not about to allow the union any access to its actual financial books and records, much less allow the cost study to be copied, or leave the plant.

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[12] In addition to again requesting a copy of the actual cost study with substantiating financial records, Lazarowitz requested the following information: 1. a product cost breakdown between material, labor and overhead for 1982 and 1983; 2. a detailed breakdown of general and administrative expenses for 1982 and 1983; 3. a balance sheet as of 31 December 1983; and 4. an explanation of interest expense calculation for 1983.

[13] To the contrary, in its brief the company asserts it was making a poverty plea.

[14] Lazarowitz was also provided most of the other information he had requested during his 22 February telephone conversation with controller Baroody.

[15] Baroody testified that Lazarowitz said he could not stay because he had to attend a Mondale/Ferraro rally in Detroit. Lazarowitz denied that he said this, testifying that such an allegation was "outrageous."

On 28 February the union's secretary-treasurer Madore had met with representatives of the Town of Newington and State DEP officials to discuss the company's problem with emissions. No one from the company was present. At the meeting Madore asked the Town Council to consider dropping the lawsuit. The mayor later told Madore the town would "consider holding the lawsuit" if the company would stay in Newington and meet State DEP standards.[16]

In a letter to Wheeler dated 2 March, Snider suggested that the union had all information necessary to evaluate the company's financial condition. According to Snider, the combination of financial data sent to UAW headquarters on 18 January, information sent on 1 February, and summary information from the consultant's cost study "should be sufficient for Gerry's [Lazarowitz] evaluation."

On 7 March, the parties met for a third time at the company's facility. Wheeler again requested copies of the cost studies. He also took exception to Snider's letter of 2 March, pointing out that Lazarowitz only spent three hours at the plant, due to other commitments made after the company advised him that a visit would be futile. Wheeler also restated the request for actual financial information contained in the company books and records, noting that Lazarowitz had indicated the union still did not have more than conclusory summary information. Wheeler asked "what it would take" to convince the company to stay in Newington. Company attorney Clemow suggested that union concessions of $1.8 million would be enough to make the relocation uneconomical. Clemow then suggested that the company would accept something less, so long as the company

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[16] The record reflects the company was already in compliance with State environmental standards as of this date, so that no additional cost would be required for compliance.

could break even. Wheler noted the big turnaround the company had already achieved, reducing losses from $6 million in 1982 to less than $500,000 in 1984.[17]

At a fourth meeting on 14 March, attorney Clemow presented a shutdown proopsal in which the company would implement only phase A of the plan (subcontracting to the Mexican border), while continuing to discuss alternatives to phases B and C. The proposal required the union to give up a scheduled five-percent wage increase due on 26 March before the company would furnish more information. The union objected to the proposal since the company did not guarantee that phases B and C would remain in Newington. Wheeler also repeated the request for the consultant's studies. Although the union did not have Lazarowitz's report, Lazarowitz had already indicated that he did not have all the information necessary to make full analysis.

The parties met again on 16 March. Later that day the union received Lazarowitz's report, indicating that some of the company's losses were attributable to flat sales and non-operating expenses caused by the 1982 move from West Hartford to Newington. The report also alleged that the cost study ignored the impact of other savings already attained in Newington. At the 16 March meeting, Wheeler asserted that Lazarowitz's report confirmed that the union could not bargain effectively without more information. According to Wheeler, the company had not spent time and money to find ways to cut costs in order to remain in Newington, but had only studied how much could be saved by relocation. Wheeler also indicated the union was willing to defer its five-percent wage increase due 26 March, resulting in an immediate savings of $125,000 per year to the company.

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[17] Further, the record reflects that in December 1983, the company posted and mailed to employees a "status report" indicating that the company was "realizing increased sales and expense reductions," and that its "Profit Improvement Plan" was "beginning to work."

The savings would compensate for the cost of the company's continued compliance with DEP emission standards, estimated at $100,000 per year. Finally, Wheeler proposed to set up a committee to evaluate the company's financial problems.

On 20 March the union gave the company a written version of the above proposal, and a copy was sent to Snider, in California at the TANA Board meeting. In a letter from attorney Clemow dated 23 March to the union, the company's counterproposal provided for the immediate implementation of phase A subcontracting, and the hiring of an outside consultant. The consultant was to be chosen by the union from the company's list, and would make a binding decision. The counterproposal required the union to give up the five-percent increase without getting access to more information.

In a letter dated 28 March, the union responded to the counterproposal with another request for information previously requested. The letter also requested new information in order to police the subcontracting provisions of the contract and to determine the company's experience with prior subcontracts, in order to bargain effectively. At another and last meeting on 29 March, Wheeler rejected the company's March 23 counterproposal until the union received more information.

The parties did not meet thereafter, although they exchanged correspondence concerning the union's request for subcontracting and cost study information. Snider testified that his final decision to relocate all unit work was made between 29 March and 9 April. On 10 April, the company disclosed its timetable for complete relocation in a letter to the union, enclosing a status report to employees dated 9 April. The letter to employees announced for the first time that the company had the approval of TANA's board of directors to go ahead with the 3-phase subcontracting and relocation plan. All nar-

row film assembly would be relocated to Mexico in June and July, fabric operation to North Carolina or Georgia in November or December, and the remainder of the operation to be relocated to North Carolina or Georgia in March or April of 1985.

By letter dated 16 April, Wheeler informed Snider that the union considered the 10 April relocation letter "a refusal to furnish information necessary for any effective bargaining," and "a disguised attempt to continue . . . unlawful subcontracting and unilateral relocation." Wheeler again responded to the company's March counterproposal, restating that it was impossible to engage in meaningful bargaining without the information requested. On 16 April Wheeler also wrote to attorney Clemow, stating that the union could not concede to "an interpretation of the contract giving the company unlimited right to abrogate the subcontracting limitations of Article II."

The company began implementing phase A subcontracting to the Mexican border in July 1984. Thereafter, between 6 August and 19 October the parties were involved in a dispute over the union's specific requests for names of subcontractors doing unit work. On 19 October, the company furnished information about "SKA, TA 200/300" work.[18] The company also furnished the name and location of the subcontractor in Del Rio, Mexico. However, the company refused to furnish all other subcontracting information, describing the union's demand as a "blanket request." In November, after an arbitration hearing, the company gave the union information about SKA subcontracting done in December 1983. However

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[18] SKA, TA 200/300 refers to the production of a cartridge for two newly-designed typewriters. The company did not consider production of the cartridge by subcontractors to be in violation of the contract, since the work was never done at the Newington plant. Wheeler testified that the work was later returned to the plant after a grievance was filed.

the union was never allowed to visit the company's facility to review the actual financial records to verify the cost study.

As equipment was removed from the plant, the union filed a series of 15 grievances. The first grievance, filed on 25 June, protested the transfer and subcontracting of work and removal of machinery under phase A of the relocation. Apparently, some of the grievances reached arbitration. In any event, the company continued to march forward by implementing its plans with the ultimate goal of complete relocation.

B. *Analysis of the Subcontracting and Relocation of Unit Work*

The parties are in substantial agreement that the issues involved in the case are as follows: whether the company was under a contractual duty to bargain with the union or whether company's decision to subcontract and relocate all bargaining unit work was a mandatory subject of bargaining; whether the union waived any right it arguably had to bargain; whether the company failed and refused to furnish information relevant and necessary for the union to effectively bargain if the obligation did in fact exist; and whether or not all contentions and differences between the parties should be deferred to arbitration. The company also contends that even if it had an obligation to bargain in good faith, the parties bargained to impasse.

1. Work Preservation Clause and Waiver Issue

The Board has held that where a contract is in effect, the employer's obligation remains the general one of bargaining in good faith to impasse over proposed changes in the terms and conditions of employment before instituting such changes. *Inland Steel Container Company*, 275 NLRB No. 129 (1985) (*"Inland Steel"*); *Milwaukee Spring II*, 268 NLRB 601, 115 LRRM 1065 (1984); aff'd

on other grounds, F.2d (D.C. Cir.), No. 84-1106 (18 June 1985), 119 LRRM 2801 (*"Milwaukee Spring II"*). Further, where the contract contains no express prohibitions regarding the contemplated changes, Section 8(d) of the Act does not cover subjects such as relocation and subcontracting, since these changes are not mandatory subjects of bargaining unless it is found that the decision turned on labor costs.[19] *Inland Steel*; *Otis Elevator Co.*, 269 NLRB 891, 115 LRRM 1281 (1984) (*"Otis II"*). If, on the other hand, the contract contains prohibitions regarding the contemplated changes (often called "work preservation" clauses), unless there is a waiver by the union, the employer must have union consent to make such changes. *Inland Steel*, at 12; *Milwaukee Spring II*, at 7, 9.

I find that the union, in the contract and by its statements and conduct, did not waive its right to negotiate over the company's decision to relocate unit work. In

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[19] Section 8(d) of the Act reads, in part, as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer* in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . and the duties so imposed shall not be construed as requiring either party to *discuss or agree* to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. [Emphasis added.]

The contract in the instant case contained no "reopener" clause. Mandatory subjects of bargaining are those which set a term or condition of employment or regulate the relation between the employer and the employee. *Latex Industries*, 252 NLRB 855, 105 LRRM 1560 (1980).

order to find a waiver it is required that the waiver must be clear and unmistakable. *Park-Ohio Industries, Inc.*, 257 NLRB 413, 107 LRRM 1498 (1981); enfd. 702 F.2d 624 (6th Cir. 1983). Further, there is a presumption that unions have not abandoned rights guaranteed them in the Act. *A-1 Fire Protection, Inc.*, 250 NLRB 217, 219, 104 LRRM 1370 (1980). In the instant case, the union repeatedly showed an interest in bargaining over the relocation of unit work. I also find the language "notify and discuss", appearing in the contract, is insufficient to constitute a clear and unmistakable waiver by the union. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 112 LRRM 3265 (1983); *Park-Ohio Industries, supra* at 413; *Pepsi Cola Distributing Company of Knoxville, Tennessee, Inc.*, 241 NLRB 869, 100 LRRM 1626 (1979); enfd. 646 F.2d 1173 (1981).

Applying the principles of *Milwaukee Spring II* to the case at hand, the question is whether the subject in dispute is identified in the contract. Article II, Section 2 of the contract states that "the Company will not transfer work customarily performed by members of the bargaining unit to another Company facility, or contract or subcontract out such work." If the subject in dispute is identified in the contract, then the question is whether the contract language rises to the level of a work preservation clause. The contract provides that the company may institute changes in certain instances. However, where the decision is based on the cost of manufacture or distribution, under the terms of the contract "the company will notify and discuss with the union as soon as possible the reasons why it believes such action to be necessary, so that the parties may explore alternatives to such transfer of work."

The company asserts that in the context of the bargaining history of the parties, the word "discuss" was not intended to mean "bargain." The company argues that the union understood that there is a distinction between

"discuss" and "bargain", since the union proposed the term, and "bargain" was used elsewhere in the contract. I do not find valid the company's argument that because "negotiate" was included in Article XVI of the contract, the parties intended "discuss" to mean something other than "bargain" in Article II, Section 2. The company also contends, inconsistently, that during contract negotiations it repeatedly sought the provision in order to be free to institute changes in bargaining unit work. However, the record does not reveal any specific discussion during negotiations regarding the definition of "discuss." In fact, the record reveals in testimony that even the company's witnesses used the words "discussion" and "negotiation" synonymously. According to the company, the term "discuss" merely obligates the company to "exchange information" without obtaining the union's consent and without reaching settlement. Such an interpretation of the contract could, in effect, amount to a mere notice, leaving the union with no actual alternatives. If "discuss" was merely intended to mean an "exchange of information", one then questions why the contract recites that the company must "notify and discuss . . . alternatives to such transfer of work." To construe the term "discuss" other than to mean "bargain" would suggest the parties agreed to discuss alternatives to relocate solely for the purpose of discussion. Such an interpretation would amount to an agreement to engage in an exercise of futility. See *Kay Fries, Inc.*, 265 NLRB 1077, 112 LRRM 1377 (1982), where the Board held that an "agreement to *discuss* alternatives" constituted a request to *bargain* (Emphasis added); and *Preston H. Haskell Co.*, 238 NLRB 943, 99 LRRM 1634 (1978), where the Board held that once the parties meet and *discuss* a new contract, *bargaining* has begun. (Emphasis added). Further, Section 8(d) of the Act refers to the duty to "*confer* in good faith", and also contains the word "discuss", both in the collective bargaining context. Thus, Section 8(d)

defines bargaining by using the terms "confer" and "discuss."

I find that the term "discuss" in the contract was not intended to connote a distinction other than the often understood meaning, to negotiate or bargain. Thus I conclude that the company was obligated to obtain consent from the union for its mid-term modification of the contract, which I find contained a work preservation clause. *Oak Cliff Goldman Baking Co.*, 207 NLRB 1063, 85 LRRM 1035 (1974), enfd. 505 F.2d 1302, 90 LRRM 2615 (5th Cir. 1974), cert. denied 423 U.S. 826, 90 LRRM 2614 (1975).

2. Mandatory Subject of Bargaining

Assuming *arguendo*, that the contract language is not deemed to reach the level of a work preservation clause, then the question is whether the company's decision to relocate work was a mandatory subject of bargaining. Recently, in *Otis II*, the Board analyzed the question of the duty to bargain over managerial decisions in light of *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).[20] In *Otis II* the employer discontinued its research and development activities in

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[20] In *First National Maintenance*, the Supreme Court classified managerial decisions into three categories: 1. decisions such as choice of advertising, product type, and financing, which have *indirect impact* on employment; 2. decisions such as the order of succession of layoffs and recalls, production quotas, and work rules which are "almost exclusively an aspect of the relationship between employer and employee,"; and 3. those decisions which are not primarily about the terms and conditions of employment, but touch on matters of central concern to the union and its members. The Court held that employers may act unilaterally as to the first category, but must bargain with the union concerning the second. For category three decisions, the Court applied a balancing test, requiring bargaining over management decisions only "if the benefit, for labor-management relations and the collective-bargaining process, out weighs the burden on the conduct of business."

Mahwah, New Jersey, consolidating them in its East Hartford, Connecticut facility without first bargaining with the union. Unable to reach a majority, the four Board members, under three somewhat different theories, decided that the employer acted lawfully. Members Dotson and Hunter held that:

> "[T]he critical factor [to determine] whether the decision is subject to mandatory bargaining is *the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs*; not its effects on employees nor a union's ability to offer alternatives. [Emphasis added.]

Member Dennis concurred, adding a two-pronged test based on the analysis in *First National Maintenance, supra.* Under the Dennis test, the General Counsel must prove (1) that a factor over which the union has control was a significant consideration in the employer's decision, and (2) that the benefit for the collective-bargaining process out weighs the burden on the business. Former Member Zimmerman concurred in part and dissented in part. In his concurrence, he indicated that bargaining over a decision is mandatory when it is "motivated by reasons peculiarly suitable for resolution within collective-bargaining framework," citing *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 57 LRRM 2609 (1964). He added that such would not be the case when the union had no ability to affect the employer's decision. Thus, the plurality opinion in *Otis II* establishes that when a decision to relocate turns upon labor costs, it falls within the scope of Section 8(d) of the Act and the employer has the general obligation to bargain and "confer" in good faith with the union to impasse before unilaterally acting. See also *Griffith-Hope Co.*, 257 NLRB No. 73, 119 LRRM 1197 (1985). If, however, the decision turned on a change in the nature and direction of business, then the employer can make the unilateral change, even where labor cost is

one factor in the decision. *Hawthorn Mellody, Inc.*, 275 NLRB No. 55, 119 LRRM 1079 (1985).[21]

Applying the standards set forth in *Otis II*, the issue in the present case is whether or not the company based its decision to subcontract and relocate unit work on labor costs. The record reflects the company's decision to relocate was based on a consultant's manufacture cost study. The company acknowledged that the study showed labor cost savings of $2 million out of a total savings of $2.6 million per year. However, the company attributes its decision to a variety of other factors, such as low productivity, compliance problems with the State DEP, adverse publicity and the dispute over noxious odors and chemical emissions, resulting in pending law suits by the Town of Newington. There is an abundance of evidence in the record that labor costs were the crucial, if not sole factor, in the company's decision to move unit work. I am not convinced that the other factors asserted by the company had any impact on the decision to relocate. The union was willing to continue meeting with the Town Counsel concerning the environmental dispute. In fact, the mayor indicated that the law suit was less important than the company remaining in Newington. The union was also willing to waive a five-percent wage increase in order to offset the cost of continued compliance with State DEP regulations. Further, in a discussion with union president Wheeler, the company acknowledged that it could remain in Newington with concessions from the union of $1.5 million, or perhaps less.[22] In the face of the company's admission that labor costs played more than

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[21] Whether or not the decision is deemed to be a mandatory subject for bargaining, an employer is obligated to bargain over the "effects" of the decision on unit employees. *First National Maintenance, supra.* There is no issue in the instant case regarding "effects" bargaining.

[22] The record is unclear as to whether this figure was a yearly or one-time amount.

a significant role in the decision to relocate and subcontract, it then became the company's burden to substantiate its assertions that other factors also played a significant role in its decision-making process. *St. Regis Paper Co.*, 247 NLRB 745, 103 LRRM 1180 (1980).

Assuming, again *arguendo*, if the contract herein was not found to have a work preservation clause (as I have found), then the work subcontracted to Mexico, representing one-third of the business, may not be a mandatory subject of bargaining, since it could be considered a change in the nature and direction of the business. However, even if the subcontracting is not considered in the calculation of labor costs, the two-thirds of the business relocated to Georgia is a substantial portion of the business, representing at least two-thirds of the $2 million savings per year which the company's own evidence reflects was directly attributable to labor costs.[23] If labor costs were the primary reason for the company's relocation decision, such costs are a subject over which the union had some control. The union was in a position to offer concessions that reasonably could have made a difference in the company's decision.

I find and conclude that the decision to relocate work in Georgia and subcontract work to Mexico, resulting in plant closure and the termination of 165 employees, was a decision amenable to the bargaining process under *Otis II*. I am also persuaded by the circumstances in this case that the benefit for labor-management relations and the collective-bargaining process outweighs any burden which would have been placed upon the company's business by requiring it to bargain about its decision.

3. Impasse

The company contends that assuming it had a duty to bargain, it did not violate the Act because it negotiated

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[23] Surely, the company can not rise above its own evidence.

to impasse. If it had been found herein that the contract did not contain a work preservation clause, and that the company's decision to move unit work did not turn on labor costs, then the company would not have been under an obligation to negotiate to impasse with the union. *Hawthorn Mellody, Inc., supra.* If, however, the company's decision turned on labor costs, as I have found, under *Otis II* the relocation decision was a mandatory subject of bargaining and the company was under the general obligation to bargain to impasse. Whether a bargaining impasse exists is a matter of judgment. *Taft Broadcasting Co.*, 163 NLRB 475, 65 LRRM 2272 (1967). In *Bell Transit Company*, 271 NLRB No. 184, 117 LRRM 1113, (1984) the Board concluded that an employer could act unilaterally without violating the Act on the basis of its "reasonable belief" that negotiations were at an impasse. The Board in *Bell Transit* also reaffirmed the five relevant factors enunciated in *Taft Broadcasting Co.* to determine whether an impasse existed, as follows: 1. the bargaining history; 2. the good faith of the parties in negotiations; 3. the length of negotiations; 4. the importance of the issue as to which there is disagreement; and 5. the contemporaneous understanding of the parties as to the state of negotiations.

In the case at hand, the company argues that it had bargained to impasse with the union. However, in my opinion the evidence in the case and the *Taft* factors support a contrary finding. Unlike *Bell Transit Co., supra*, where the parties had an extended amicable relationship of 26 years, in this case the parties had a relatively short bargaining history of one year when relocation discussions began. Moreover, in *Bell Transit Co.*, it was undisputed that negotiations were conducted in good faith. Here, the question of whether the company bargained in good faith, as required in Sections 8(a)(5) and 8(d) of the Act, is raised by the issue of whether the company met its duty to furnish relevant and necessary

information, treated more completely in the next section of this Decision. In this case I cannot find a good faith attempt to find a basis for agreement where the parties met and "discussed" matters only six times, and where the company gave the union a virtual "take it or leave it" proposition on phase A subcontracting (to Mexico).[24] The company argues that impasse was reached on 29 March, but the record indicates the company had, in effect, frozen its position on phase A of the shutdown plan. The company's final offer of 23 March was simply a consolidation of its previous positions. Moreover, on cross-examination the company's (then) industrial relations manager James Conley agreed that "the meetings between 21 February and 29 March were not negotiating sessions."[25] The company suggests that the union's 8(a)(5) request for information on 28 March was an attempt to "bootstrap" out of the grievance procedure. I disagree and find it equally plausible that the company's insistence on implementing phase A of the shutdown plan reflected that the company was engaging in deceptive actions intended to insure that agreement would not be reached. The union was willing to forgo a five-percent increase in wages, demonstrating a greater willingness to give. In my opinion the company adopted a purposeful strategy to insure that bargaining or "discussions" would be futile or would fail and accomplish nothing. See *Hudson Chemical Company*, 258 NLRB 152, 108 LRRM 1126 (1981.) Thus, I find the company's assertion that it bargained to impasse inconsistent with the evidence and without merit.[26]

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[24] For a comprehensive discussion and summary of the law regarding the definition of "good faith", see *Weather TEC Corporation*, 238 NLRB 1535, 1557-1564 (1978), where the Board indicated there is no simple yardstick.

[25] Here again the company's impasse defense rises above its own evidence to the contrary. Conley was no longer with the company when he testified. However, he was called as a company witness.

[26] While realizing that some of the company's defenses are alternative, it nevertheless becomes increasingly difficult to discuss them in this Decision because they are themselves inconsistent.

4. Deferral and the 8(a) (5) Information Requests

a. *The Deferral Contenion*

The company contends that the union's requests for information should be treated in the same manner as other issues governed by the Board's deferral policy. The company also maintains that the grievance-arbitration provisions of the collective-bargaining agreement "clearly encompass" the waiver and work preservation issues raised in the case, and therefore, that the case should be deferred to the contract's grievance-arbitration procedure. Article VI, Section 1 of the contract defines a grievance as follows:

> A grievance shall mean a complaint by an employee or group of employees or the Union that there has been a violation, misinterpretation or misapplication of this agreement. A grievance shall also mean a complaint concerning other conditions of employment, except that such complaints shall not be subject to Step 4 of Section 2, and the decision at Step 3 shall be final.

Section 2 of the agreement provides for a four-step procedure which culminates in mandatory and binding arbitration.[27] The company contends that the grievance-arbitration procedure is more expeditious than Board proceedings, and that the delay has prejudiced the company in that an arbitrator's decision rendered within thirty days would have preceded layoffs of unit employees and avoided any resulting backpay liability. For these reasons the company maintains that the Sub-Regional Office

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[27] Under the provisions of Section 2, grievances are initially submitted to the employee's immediate supervisor (Step 1). Thereafter, unsettled grievances may be appealed to the Grievance Committee and Company Committee (Step 2), next to a group consisting of the Grievance Committee, the union president, and the company Management Committee (Step 3), and finally to mandatory and binding arbitration (Step 4).

should have deferred to the grievance-arbitration procedure rather than issuing a complaint.

However, in agreement with the General Counsel and the union, I find the issues involved in this case should not be resolved by deferral. The language in Article 11, Section 2 of the contract which obligates the company to "notify and discuss" alternatives to work relocation is clearly a work preservation clause. The clause gives the union the contractual and statutory right to veto relocation of unit work and entitles it to necessary and relevant information in order to bargain or intelligently investigate and file grievances. The Board has treated the term "discuss" as the equivalent to "bargain." See *Kay Fries, supra.* Further, Section 8(d) of the Act specifically defines collective bargaining as the duty to "*confer*" in good faith." The duty is not to be construed as requiring parties to "*discuss or agree*" to modifications of the contract in mid-term, as Section 8(d) itself recites.

Further, the company can not itself successfully obtain deferral after denying information vital to the very process it now advocates. A Section 8(a)(5) violation based on an information request is an exception to the Board's general deferral policy since denial of necessary information is a rejection of the bargaining process. See *United Technologies Corporation*, 268 NLRB 557, 115 LRRM 1049 (1984).

The General Counsel, in opposing deferral, relies on the reasons expressed by the Board of *General Dynamics Corp.*, 268 NLRB 1432, 115 LRRM 1199 (1984) ("*General Dynamics I*"). See also *General Dynamics I* the union had requested information to determine whether to file grievances regarding the subcontracting of unit work. The Board, in rejecting the deferral contention, stated as follows:

> [W]e find no merit in encumbering the process of resolving the pending subcontracting grievances with

> the inevitable delays attendant to the filing, processing, and submission to arbitration of a new grievances regarding the information request. *Such a two-tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration nor would it be consistent with prior Board decisions in this area. See, e.g. Safeway Stores*, 236 NLRB 1126 fn. 1 (1978); *St. Joseph's Hospital*, 233 NLRB 1116, fn. 1 (1977). [Emphasis added.]

The Board's reasons for refusing to defer in *General Dynamics I* are consistent with the reasoning by the Supreme Court in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 64 LRRM 2069 (1967). There, the Court observed that the Board's action, in ordering the employer to furnish the union the requested information, furthered the arbitral process. The Court stated that if all claims had to be processed through to arbitration, "[i]t would force the Union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the claim. The expense of arbitration might be placed upon the Union only for it to learn that the machines had been relegated to the junk heap." (*Id.* at 438-439).

In advocating deferral, the company relies on *United Technologies Corp., supra*, which extended the *Collyer* doctrine to cases arising under Sections 8(a)(1) and (3) of the Act.[28] The company also relies on *United Aircraft Corp.*, 204 NLRB 879, 88 LRRM 1411 (1973), where the Board determined that the "waiver" question in the circumstances of the case would best be resolved by

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[28] In *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971), the Board established a policy of deferral to the grievance-arbitration process to encourage the pursuit of collective bargaining solutions, holding that the union's Section 8(a)(5) charge, alleging unilateral changes in conditions of employment, should be deferred to the grievance-arbitration procedure of the parties' labor contract.

arbitration.[29] However, subsequent to the Board's policy announced in *Collyer*, the Board implicitly agreed with the Supreme Court's rationale in *Acme Industrial Co., supra*, in concluding that an 8(a)(5) allegation based on a denial of information relevant to the evaluation and processing of a grievance would *not* be deferred to arbitration. In *United-Carr Tennessee, a Division of TRW, Inc.*, 202 NLRB 729, 731, 82 LRRM 1795 (1972), the Board adopted the Administrative Law Judge's holding that "where the employer withholds requested information which is potentially relevant in assisting a union intelligently to evaluate or process a grievance—unless the statutory right to such information is effectively waived in the contract—the Board's *Collyer* doctrine is not applicable to such an issue." See also *Voorhees Painting Co.*, 275 NLRB No. 114, 119 LRRM 1228 (1985); *General Dynamics II; General Motors Corp.*, 257 NLRB 1068, 108 LRRM 1030 (1981); and *Worcester Polytechnic Institute*, 213 NLRB 306, 87 LRRM 1616 (1974). In the case at hand, the company either overlooks or impliedly ignores the union's statutory right to relevant information, absent waiver.[30] This statutory right has been accorded prominence by the overwhelming weight of time-tested decisions by the Board and the Courts. See *NLRB v. Acme Industrial Co., supra; The New York Times Company*, 270 NLRB No. 194, JD slip op. at 15, 117 LRRM 1117 (1984); *Pfizer, Inc.*, 268 NLRB 916, 918, 115 LRRM 1105 (1984), enfd. 763 F.2d 887 (7th Cir. 1985), 119 LRRM 2947; *National Cleaning Service*, 265 NLRB 1352, 1353, 112 LRRM 1150 (1982); *Chesapeake and Potomac Telephone Company*, 259 NLRB 225, 226-227,

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[29] In contrast with the contract in this case, in *United Aircraft Corp.* a provision of the contract required production of pertinent information at Step 1 of the grievance procedure which the Board found to be a waiver of the union's right to information earlier in the proceedings.

[30] The relevancy issue will be discussed in the next sub-section of this Decision.

109 LRRM 1019 (1981); enfd. 687 F.2d 633 (2nd Cir. 1982); *General Dynamics I* at 1632. Cf. *United Aircraft Corp., supra.* Since *United Aircraft,* the Board has not deferred to arbitration the issue of the statutory right to the production of information under Section 8(a)(5) of the Act. See *General Dynamics II.*

While Board decisions have followed the Federal labor policy favoring arbitration, e.g. *Collyer Insulated Wire, supra; United Technologies Corp., supra,* it has, as noted above, rejected the notion that blind adherence thereto serves the policies of the Act or furthers the collective bargaining process. Accordingly, I find this case to be properly before the Board and reject the company's contention that deferral is appropriate.

b. *Whether the requested information was relevant and necessary*

This case turns largely on whether the requested information was relevant and necessary to the union in the exercise of its responsibilities as the exclusive bargaining representative for the union employees. The law is well settled that an employer's duty to bargain with the majority representative of its employees includes the duty to furnish information relevant to a labor union's performance of its duties under a collective-bargaining agreement. *Pfizer, Inc., supra; Detroit Edison Co. v. NLRB,* 440 U.S. 301, 100 LRRM 2728 (1976); *NLRB v. Acme Industrial Corp., supra; Truitt Manufacturing Co.,* 351 U.S. 149, 38 LRRM 2042 (1956). The duty to provide information exists "if there is a *probability* that such data is relevant and will be of use to the union in fulfilling its statutory duties." *Associated General Contratcors of California,* 242 NLRB 891, 101 LRRM 1260 (1979), enfd. 633 F.2d 706 (9th Cir. 1980). The courts have held that information pertaining to mandatory subjects of bargaining, e.g., wages, hours, terms and conditions of unit employees, is "so intrinsic to the core of the employer-

employee relationship, that such data is considered presumptively relevant." *San Diego Newspaper Guild*;[31] *Teleprompter Corp. v. NLRB*.[32] *Teleprompter Corp.* also held that "[a] union request for such data must be honored; refusal constitutes in most instances a *per se* violation of the duty to bargain in good faith." See also *Boston Herald-Traveler*,[33] where the Court stated "it is not required that the union show the precise relevancy of the requested information to particular current bargaining issues", quoting the Board in *Whitin Machine Works*,[34] where the Board found ". . . it is sufficient that the information sought by the union is related to the issues involved in collective bargaining, and that no specific need as to a particular issue must be shown." The Board has observed recently that the "information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it." *Pfizer, Inc., supra.* Further, the Board and the courts have employed a broad discovery-type standard. *Pfizer, Inc., supra; Procter & Gamble Manufacturing Co.*, 237 NLRB 747, 99 LRRM 1245 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979); *General Motors Corp.*, 257 NLRB 1068, 108 LRRM 1030 (1983), enfd. 700 F.2d 1083, 112 LRRM 2976 (6th Cir. 1983); *Press Democrat Publishing Co.*, 237 NLRB 922, 99 LRRM 1229 (1978), enfd. 629 F.2d 1320, 105 LRRM 3046 (9th Cir. 1980). When the union requests information which is *not* ordinarily pertinent to its performance as the bargaining representative, such as data on financial

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[31] 548 F.2d 863, 867 (9th Cir. 1977), 94 LRRM 2923, 2926, enfg. 220 NLRB 1226, 90 LRRM 1619 (1975).

[32] 570 F.2d 4, 8 (1st Cir. 1977), 98 LRRM 2455, 2457, enfg. 227 NLRB 705, 95 LRRM 1058 (1977).

[33] 223 F.2d 58, 63 (1st Cir. 1955), 36 LRRM 2220, 2224, enfg. 110 NLRB 2097, 35 LRRM 1309 (1954).

[34] 108 NLRB 1537, 1539, 34 LRRM 151, 1252 (1954), enfd. 217 F.2d 593, 594 (4th Cir. 1954), 35 LRRM 2215, 2216, cert. denied, 349 U.S. 905 (1955).

and sales information, the union is under the burden to show that the information is relevant to the bargainable issues. *Ohio Power Co.*, 216 NLRB 987, 89 LRRM 1239 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976); *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). However, where an employer makes claims that it would go broke or bankrupt if it granted a wage increase as requested by the union, the employer must present adequate information to enable the union to intelligently determine whether the employer was making its best offer. *Fountainhead Development Corp.*, 270 NLRB No. 34, 116 LRRM 1219 (1984) (involving a union request for "financial books and records.")

However, in applying the foregoing, I find, for reasons noted below, that much of the requested information was presumptively relevant. In this case the question is whether the company unlawfully refused to bargain by failing to provide the union with a copy or reasonable and timely access to the following: 1. the actual manufacturing cost study; 2. substantiating financial books and recodds; and 3. certain subcontracting information.

(1) The manufacturing cost study and substantiating books and financial records

The union made its first request for a copy of the manufacturing cost study in a letter from Lazarowitz to the company's comptroller Ed Baroody on 17 February. However, the company did not allow the union access to the actual study until Lazarowitz's 1 March visit to the Newington facility, when he insisted that summary reports were not sufficient to verify or substantiate the company's financial position. The company then showed Lazarowitz a 43-page cost study, but refused his request for a copy.

I find the union's repeated requests for a copy of the study were reasonable, in that the most study was one of several items relevant and necessary for the union to meet its obligation under the work preservation clause

of the contract. Indeed, Section 8(d) of the Act creates a duty to bargain collectively "with respect to wages, hours, *and other terms and conditions of employment.*" (Emphasis added). The cost study clearly concerns "terms and conditions of employment" in this case, i.e., the contract prohibition of the relocation and subcontracting of unit work, subject to the statutory mandate of good faith bargaining. Further, even if there had been no express prohibition inu the contract regarding the relocation and subcontracing of unit work, the company had a statutory duty to timely furnish the cost study since, as I have found, the relocation of work turned on labor costs and was a mandatory subject of bargaining. As such, the burden is on the company to show a lack of relevance of the requested information. See *Procter & Gamble Mfg., supra.*

The company contends that even if it was under an obligation to furnish copies of the cost study, on its premises for as long as necessary. However, the company's offer to pay Lazarowitz's expenses so that he could continue to evaluate the study was an offer of too little that came too late. The offer was made only after the company changed its position, maintained since mid-February, not to allow Lazarowitz to visit the Newington facility, and after Lazarowitz demanded to see the actual cost study on 1 March.

Thus, I conclude that such restrictive access to the cost study only twenty days before the company's own 21 March deadline to decide whether to relocate did not allow the union sufficient time for analysis and effective negotiation. According to Lazarowitz, an evaluation of the study could have been done in one or two weeks. Lazarowitz indicated that in the past, elaborate evaluations required about two weeks, but that it is impossible to predict the time needed to complete a report. Even under the shortest time frame, a report produced in one week would allow only eight working days to bargain

before the 21 March deadline. If two weeks were necessary to produce the report, the 21 March deadline would allow only three days for bargaining. I also conclude that the company did not meet its obligation to furnish relevant information by giving the union summaries of the cost study. Such summary accounts are even further removed from the original financial records, when prepared, as here, by a company employee from the figures assembled by unknown consultants. To accept the company's summary accounts the union would have to rely completely upon the accuracy and integrity of the employer. The company's claim that it was losing money and could achieve higher profits through the relocation and subcontracting of work amounts to a claim of inability to pay.[35] Where the employer claims economic inability to pay, conclusory facts and figures can be misleading and the union is entitled to the source material upon which the study is based. See *Metlox Manufacturing Company*, 153 NLRB 1388, 59 LRRM 1657 (1965), enfd. 378 F.2d 728 (9th Cir. 1967).

Even if the company had offered reasonable and timely access to the cost study, the law is clear that the union was entitled to see the books and records to substantiate the company's financial situation. In my opinion, the cost study was used as a smoke screen to keep the actual records from the union. The company led the union down the garden path, creating an issue over the cost study, whereas the true issue was the union's right to access to the actual books and records. The record in this case reflects that as early as 21 November 1983 Wheeler had requested access to the company's financial records. Although the company furnished a large amount of financial information requested by the union, what it did not provide was access to substantiating financial records,

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[35] In its brief the company asserts that by 1 March "the union had all the information necessary to verify the company's *'poverty plea'*."

the actual books and records. When the company in so many words raised a plea of economic hardship, the union then has a right to inspect the books, and no impasse can be reached so long as the employer refuses to provide such financial records. *Harvstone Manufacturing Corp.*, 272 NLRB No. 144, 117 LRRM 1447 (1984). See also *Metlox Manufacturing, supra*, where the Board approved a check of the employer's books by a union accountant, limited to the purposes of certifying profit and loss figures offered by the employer and determining whether there were factors that would make the employer's figures misleading.

The company relies on *NLRB v. Abbott Publishing Co.*, 331 F.2d 109 (7th Cir. 1964), 55 LRRM 2994, wheer the court refused to enforce the Board's order (139 NLRB 1328) that the employer was obligated to turn over his books to substantiate a plea of poverty. In that case, however, the employer granted the union's request for information which would have allowed union bookkeepers ample time to inspect certain confidential information, but the union never took advantage of the employer's offer.[36] The company also relies on *Fruit Packers v. NLRB*, 316 F.2d 382, 52 LRRM 2537 (D.C. Cir. 1963). In that case the court affirmed the Board's decision in part (130 NLRB 1269) in holding that the employer can attach certain conditions in making available its books and records. However, the union admitted the conditions were "not unreasonable", and there were no time constraints.

The cost study itself was drawn and extrapolated from the company's books and records. Without the substantiating information, such a cost study could be as misleading as the summaries, and is not the same as, nor a fair substitute for, the original books and records which,

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[36] I also note at this point that I am duty-bound to follow the Board's law, and not that of the Federal Circuits.

if not made available to the union, are thereby immunized from question, correction, discussion, or meaningful negotiation.

The company further contends that the cost study and actual books and records are protected by a privilege of confidentiality, justifying limited access to only the cost study provided to the union. The company here cites *White Furniture Co.*, 161 NLRB 444, 63 LRRM 1277 (1966), aff'd sub nom., 388 F.2d 880 (4th Cir. 1967). However, in that case the employer made no suggestion of inability to pay, and had already complied with the union's request for substantial amounts of information. The Board also found in *White Furniture, supra* that the union failed to show a special need for the information withheld. In this case, I find the company's confidentiality contentions to be frivolous and without merit. Considering the potential threat of complete plan closure, the union was entitled to the financial books and records to substantiate the company's claim of financial hardship. Thus, I find that the union met any burden it had to show special need for access to such data. *Ohio Power Co., supra*; *Rockwell-Standard Corp., supra*; *Fountainhead Development Corp., supra.* In light of the circumstances, particularly the company's complete failure to provide access to substantiating books and records, and its dilatory tactics in providing access to the cost study, I find that the company failed to bargain in good faith by denying and improperly limiting timely access to relevant information necessary for the union to meet its statutory duties.

(2) The subcontracting information

The company contends that the union's request for all subcontracting information was not relevant and necessary in order for the union to meet its stautory duty. According to the company, the requested information concerning SKA, TA 200/300 subcontracting was furnished

to the union, but the union's request for additional information was not related to the work relocation plan and was merely devised to "bootstrap" the union out of deferral to the grievance-arbitration process. Board law is clear that information is relevant if it is reasonably necessary in order to administer a collective-bargaining agreement, detect infractions of its terms, and to intelligently counsel the employees whom it represents. The Board has also held that a union is entitled to information requested which bears upon the union's determination to file a grievance or is helpful in evaluating the propriety of going to arbitration. *Brooklyn Union Gas Company*, 220 NLRB 198, 90 LRRM 1479 (1975).

Contrary to the company's contention, I find that the union's 28 March and 6 August written requests for subcontracting information clearly set forth relevant reasons for the request.[37] The union stated that the information was necessary in order to police the work preservation clause of the contract, to intelligently file grievances, and to negotiate concessions with knowledge of previous subcontracting terms. No special knowledge is required to recognize that information about subcontracting is related to the contract's express prohibition against subcontracting unit work. It also does not follow in this case that the union waived its right to information about subcontracting because the company had previously subcontracted work without union obpection. During previous subcontracting the union was not faced with plant closure or relocation, or the loss of unit employees.

C. *The 8(a)(3) Issue and Union Animus*

In addition to violations of Section 8(a)(5) and (1) of the Act, the complaint also alleges a violation of Section 8(a)(3) and (1) of the Act. However, the briefs

[37] In fact, as early as 8 December 1983 the union had requested, in writing, detailed information from the company regarding all subcontracting.

curiously do not address either the 8(a)(3) issue or the subject of union animus on the part of the company. I deem it necessary to treat both subjects in this Decision.

At first blush one might conclude in this case that the company was motivated by legitimate business objectives. Indeed, a savings of 2.6 million dollars annually is sizeable. However, not only were the some 165 employees involved, there was a union and a contract. The contract was violated and employee rights contained therein were violated. The union was wiped out and two-thirds its work was relocated to a new plant in a southern right-to-work state, with the remainder subcontracted to Mexico. Yet, with the union out of its hair and the lives of 165 people significantly affected by the withdrawal or cancellation of rights they thought secure by contract, the company would have us look the other way and say that's life, and also life under law.[38] Such should not be and is not the case here. Although the Board discussed 8(a)(3) and union animus in *Milwaukee Spring II*, at 604, it found no need to decide the issue because there was no 8(a)(5) violation found and the complaint was dismissed. More recently the Board found it unnecessary to determine whether a respondent violated Section 8(a)(3) because an 8(a)(5) was found, and backpay was ordered. The Board indicated that an 8(a)(3) violation would be cumulative and would not affect the remedy. *Pennsylvania Energy Coporation*, 274 NLRB No. 174 (27 March 1985). In light of the facts and circumstances of this case, I find such a determination to be necessary. I find the company's actions, standing alone, were discriminatory and violative of Section 8(a)(3) of the Act as alleged in the amended complaint. In this regard, I also find that the company had union animus, as its actions were inherently destructive of important employee rights.

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[38] The record reflects that the labor force in Newington was not transitory. Some employees had been with the company over 30 years.

See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 65 LRRM 2465 (1967). Additionally, I further find, under the facts and circumstances of this case, that the 8(a)(3) violation also flowed from my finding that the company's relocation decision violated Section 8(a)(5) of the Act. See *Milwaukee Spring I*, 265 NLRB 206, 111 LRRM 1486 (1982).

Upon the foregoing findings of fact and initial conclusions of law, and upon the entire record, I hereby make the following:

Conclusions of Law

1. The Respondent Employer is an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. That the Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. That the Respondent Employer violated Sections 8(a)(5) and (1) and 8(d) of the Act by its failure to timely furnish necessary, needed and relevant information to the Charging Union, and by its refusal to furnish necessary, needed and relevant information to the Charging Union, all of which information was necessary for the Charging Union to fulfill in statutory duty under Section 8(d) of the Act.

4. That the Respondent Employer violated Sections 8(a)(3) and (1) and Section 8(d) of the Act in that it discriminated against its employees in regard to the tenure and terms and conditions of their employment by failing to provide the Charging Union with necessary and relevant information and thereby failing to bargain in good faith, and by terminating said employees through plant closure in violation of the terms of the collective-bargaining agreement with the Charging Union.

5. That the violations found in paragraphs 3 and 4 above, affected commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the company engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 8(a)(3) and (1 of the Act, I shall recommend that it be ordered to take certain affirmative actions designed to effectuate the policies of the Act.

The company's wrongful unilateral relocation of unit work resulted in the termination of some 165 employees and closure of the plant. The company projected that completion of the three shutdown phases would be accomplished or completed by March or April 1985.[39] It is well established that in fashioning an appropriate remedy ". . . we must be guided by the principle that the wrongdoer, rather than the victims . . . should bear the consequences of his unlawful conduct," and that the remedy should be adapted to the situation that calls for redress. *Transmarine Navigation Corp.*, 120 NLRB 389, 67 LRRM 1419, 1420 1968; *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1264 (1966). The nature of the violation would normally justify ordering the company to restore the situation existing prior to the shutdown of the Newington operation by reopening the facility. The General Counsel requests an order which would require such a restoration to the *status quo ante*, as provided in *Los Angeles Marine Hardware, Co.*, 235 NLRB 270, 98 LRRM 1571 (1978), enfd. 602 F.2d 1320 (9th Cir. 1979). However, under the circumstances of this case, including the lapse of time, the removal and sale of machinery, and the distance of the relocation, that remedy would be impractical and unduly burdensome for the company. See *Whithall Packing Company*, 257 NLRB 193, 107 LRRM 1449 (1981); *Ozark Trailers, supra.*

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[39] The company's board of directors approved the shutdown and relocation plan in general on or about 22 March. Sometime between 29 March and 9 April Snider concluded that the full plan would go forward no matter what transpired regarding the union. In considering the remedy in this case, the assumption is made that the plant is now closed and the company is far removed from Newington.

The violation would also justify ordering the company to furnish the information requested and not received by the union. But the company's violations of Section 8(a)(5) and (1) of the Act in this respect are now moot as the actions of the company have rendered this information useless. Therefore, I shall not recommend that the company be compelled to furnish the requested information. I shall also not recommend the usual cease and desist provisions or that the company post the usual and appropriate notice because the company's Newington plant is now nonexistent.

Accordingly, I shall recommend a make-whole remedy in order to effectuate the policies of the Act. I shall recommend that the company be ordered to pay all employees, terminated because of the plant closure, backpay at the rate of their normal wages from the date each was terminated until the expiration of the collective-bargaining agreement on 23 March 1986.[40] The backpay shall also include any insurance and pension benefits which were due and payable under Article XII of the contract. See *Merryweather Optical Co.*, 240 NLRB 1213, 100 LRRM 1412 (1979). Interest on all backpay due shall be computed in the manner prescribed in *F.W. Woolworth Company*, 90 NLRB 289, 26 LRRM 1185 (1950), and *Florida Steel Corporation*, 231 NLRB 651, 96 LRRM 1070 (1977).[41]

Upon the foregoing findings of fact and conclusions of law, the entire record, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

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[40] The contract expired on 23 March 1986. I am aware that its contains a continuation or extension clause. However, I can find no authority to extend the backpay date beyond the expiration date.

[41] See generally, *Isis Plumbing & Heating, Co.*, 138 NLRB 716, 51 LRRM 1122 (1962).

ORDER [42]

The Respondent, Roytype Division, Royal Business Machines, Inc., its officers, agents, successors and assigns shall:

Take the following affirmative action necessary to effectuate the policies of the Act:

1. Make all unit employee whole for any loss of pay and other benefits they may have suffered as a result of the Respondent's closure and relocation of its Newington, Connecticut facility and work, including subcontracting work to Mexico, by paying said employees wages and benefits as set forth in the collective-bargaining agreement with the Union. Such wages and benefits shall be calculated from the date each said employee was terminated, and run through 23 March 1986, and are to be computed in the manner set forth in the section of this Decision entitled "Remedy." The unit involved shall be considered that unit described in Article I of the collective-bargaining agreement and in paragraph 7 of the amended complaint herein.

2. Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

Dated: Washington, D.C., August 20, 1985.

/s/ Russell M. King, Jr.
RUSSELL M. KING, JR.
Administrative Law Judge

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[42] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case Nos. 39-CA-2138-1
39-CA-2138-3

ROYTYPE DIVISION, PERTEC COMPUTER CORPORATION,
A WHOLLY OWNED SUBSIDIARY OF TRIUMPH-ADLER
NORTH AMERICA, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA (UAW), LOCAL 376

CORRECTION

On 30 June 1987 the National Labor Relations Board issued a Decision and Order Remanding in the above-entitled proceeding in which page 25 of the administrative law judge's decision was inadvertently omitted. Please add the attached to your copy.

Dated: Washington, D.C. 20 July 1987

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 39-CA-2138-1
39-CA-2138-3

ROYTYPE DIVISION, ROYAL BUSINESS MACHINES, INC.,
Respondent Employer

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), LOCAL 376
Charging Union

ERRATA

The Decision in the above matter is hereby corrected to read as follows:

Page 23, Line 16 Change "union" to "antiunion"

Page 24, Line 43 Change "23 March 1986" to "23 March 1985".

Page 24, Line 42 Change "23 March 1986" to "23 March 1985".

Page 25, Line 24 Change "23 March 1986" to "23 March 1985".

Dated: Washington, D.C., September 13, 1985

/s/ Russell M. King, Jr.
RUSSELL M. KING, JR.
Administrative Law Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of April, one thousand nine hundred and ninety-one.

Docket Number 90-4068, 90-4082, 90-4094

OLIVETTI OFFICE U.S.A., INC., OLIVETTI SUPPLIES, INC.,
Petitioners,
Cross-Respondents,

v

NATIONAL LABOR RELATIONS BOARD,
Respondent,
Cross-Petitioners,

UAW LOCAL 376,
Intervenor

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Intervenor UAW LOCAL 376.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90-4068

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Intervenor.

No. 90-4082

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES, INC.,
Intervenors.

No. 90-4094

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROYTYPE DIVISION, TRIUMPH-ADLER-ROYAL INC. and ITS SUCCESSORS, OLIVETTI OFFICE U.S.A. INC. and OLIVETTI SUPPLIES, INC.,
Respondents.

JUDGMENT

[Filed Mar. 27, 1991]

Before: OAKES, *Chief Judge*, CARDAMONE and MCLAUGHLIN, *Circuit Judges.*

The above consolidated causes came to be heard upon petitions filed by Olivetti Office U.S.A. Inc., and Olivetti Supplies, Inc., as "successors in interest" to Roytype Division, Triumph-Adler-Royal, Inc. initiated Case No. 90-4068, and International Union, U.A.W., Local 376, to review an order of the National Labor Relations Board issued against Roytype Division, Triumph-Adler-Royal, Inc., its officers, agents, successors, and assigns, and upon a combined application and cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 26, 1990, and has considered the briefs and transcript of record filed in this case. On February 14, 1991, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's said order, as modified. In conformity therewith, it is hereby.

ORDERED AND ADJUDGED by the Court that the Company, Roytype Division, Triumph-Adler-Royal, Inc., Newington, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively and in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, AFL-CIO (hereinafter called the Union) as the exclusive representative of its employees in the appropriate unit set forth below, concerning the decision to subcontract bargaining unit work from its Newington, Connecticut facility and to relocate bargaining unit work permanently to other facilities. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks and quality control technicians employed [formerly] by Respondent at its Newington facility, excluding managerial employees, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

(b) Refusing to furnish the Union with information necessary for and relevant to its function as bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make the Newington employees whole for any loss of earnings and other benefits suffered by paying them what they normally would have earned from the date of their termination until March 23, 1985. Backpay shall be based on the earnings that employees normally would have received during the applicable period less any net interim earnings and shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

with interest computed in the manner set forth in *New Horizons for the Retarded.*[1]

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(c) Mail copies of the attached notice marked "Appendix" to all the Company's employees who were employed at the Newington facility in the appropriate unit who were terminated or laid off as a result of the subcontracting and relocation of bargaining unit work.

(d) Notify the Regional Director, in writing, within 20 days from the date of this Judgment what steps the Company has taken to comply.

IT IS FURTHER ORDERED that each party shall bear its own costs.

/s/ James L. Oakes (Per Jcl)
Judge, United States Court of
Appeals for the Second Circuit

/s/ Richard J. Cardamone (Per Jcl)
Judge, United States Court of
Appeals for the Second Circuit

/s/ Joseph M. McLaughlin
Judge, United States Court of
Appeals for the Second Circuit

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[1] 283 NLRB 1173 (1987).

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

WE WILL NOT refuse to bargain collectively in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, AFL-CIO as the exclusive representative of our employees in the appropriate unit set forth below, concerning the decision to subcontract bargaining unit work and to relocate work permanently to other facilities. The appropriate unit is:

> All full-time and regular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks and quality control technicians employed [formerly] by us at our Newington facility, excluding managerial employees, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

WE WILL NOT refuse to furnish the Union with information necessary for and relevant to its function as bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make the Newington, Connecticut employees whole, for any loss of earnings and other benefits suffered, by paying them what they normally would have earned from the date of their termination until March 23, 1985, with interest.

ROYTYPE DIVISION,
TRIUMPH-ADLER-ROYAL, INC.

(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Commercial Plaza, 21st Floor, Hartford, Connecticut 06103-3599, Telephone 203-240-3373.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90-4068

Board Case Nos.
39-CA-2138-1, 39-CA-2138-3

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Intervenor.

No. 90-4082

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES INC.,
Intervenors.

No. 90-4094

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROYTYPE DIVISION, TRIUMPH-ADLER-ROYAL INC. and
ITS SUCCESSORS, OLIVETTI OFFICE U.S.A. INC. and
OLIVETTI SUPPLIES, INC.,
Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment, in the above-captioned case, has this day been served by first class mail upon the following counsel at the addresses listed below:

Susan Price-Livingston, Esq.
Gould, Livingston, Adler & Pulda
606 Farmington Avenue
Hartford, CT 06105

Brian Clemow, Esq.
Richard Mills, Esq.
Shipman & Goodwin
799 Main Street
Hartford, CT 06103

/s/ Aileen A. Armstrong
AILEEN A. ARMSTRONG
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 27th day of February, 1991.

APPENDIX H

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

Elaine B. Goldsmith
Clerk

NLRB
39-CA-2138

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of April, One Thousand Nine Hundred and ninety-one.

Docket No. 90-4068

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Intervenor.

Docket No. 90-4082

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES, INC.,
Intervenors.

The attached judgment having been entered in error on March 27, 1991, is hereby VACATED.

ELAINE B. GOLDSMITH,
Clerk
By: GENEVIEVE KEEGAN

/s/ Genevieve Keegan
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90-4068

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Intervenor.

No. 90-4082

INTERNATIONAL UNION, U.A.W., LOCAL 376,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES, INC.,
Intervenors.

No. 90-4094

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROYTYPE DIVISION, TRIUMPH-ADLER-ROYAL, INC. and
ITS SUCCESSORS, OLIVETTI OFFICE U.S.A., INC. and
OLIVETTI SUPPLIES, INC.,
Respondents.

JUDGMENT

[Mar. 27, 1991]

Before: OAKES, *Chief Judge*, CARDAMONE and McLAUGHLIN, *Circuit Judges*.

The above consolidated causes came to be heard upon petitions filed by Olivetti Office, U.S.A., Inc., and Olivetti Supplies, Inc., as "successors in interest" to Roytype Division, Triumph-Adler-Royal, Inc. (Case No. 90-4068), and International Union, U.A.W., Local 376 (Case No. 90-4082) to review an order of the National Labor Relations Board issued against Roytype Division, Triumph-Adler-Royal, Inc., its officers, agents, successors, and assigns, and upon a combined application and cross-application of the National Labor Relations Board to enforce said order (Case No. 90-4094). The Court heard argument of respective counsel on November 26, 1990, and has considered the briefs and record filed in this case. On February 14, 1991, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's said order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Olivetti Office U.S.A., Inc. and Olivetti Supplies, Inc. their officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the National Labor Relations Act:

(a) Make whole for any loss of earnings and other benefits all employees represented by U.A.W. Local 376 in the bargaining unit set forth below who were employed at the Newington facility of Roytype Division, Triumph-Adler-Royal, Inc. and who were terminated or laid off on or before March 23, 1985 as a result of the subcontracting and relocation of bargaining unit work, by paying such employees what they normally would have earned from the date of their termination until March 23, 1985. Backpay shall be based on the earnings that employees normally would have received during the applicable period less any net interim earnings, and shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90

NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded.*[1] The bargaining unit is:

> All full-time and regular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks and quality control technicians formerly employed by Roytype Division, Triumph-Adler-Royal, Inc. at its Newington facility, excluding managerial employees, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(c) Mail copies of the attached notice marked Appendix to all the Company's employees in said bargaining unit who were employed at the Newington facility and who were terminated or laid off on or before March 23, 1985 as a result of the subcontracting and relocation of bargaining unit work.

(d) Notify the Regional Director, in writing, within 20 days from the date of this Judgment what steps the Company has taken to comply.

IT IS FURTHER ORDERED that each party shall bear its own costs.

/s/ James L. Oakes (Per Jcl)
Judge, United States Court of
Appeals for the Second Circuit

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[1] 283 NLRB 1173 (1987).

/s/ Richard J. Cardamone (Per Jcl)
Judge, United States Court of
Appeals for the Second Circuit

/s/ Joseph M. McLaughlin
Judge, United States Court of
Appeals for the Second Circuit

APPENDIX

NOTICE TO EMPLOYEES

PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that our predecessor, Roytype Division, Triumph-Adler-Royal, Inc., violated the National Labor Relations Act and has ordered us to abide by this notice.

WE WILL make whole for any loss of earnings and other benefits all employees represented by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 376, AFL-CIO in the bargaining unit set forth below who were employed at the Newington facility of Roytype Division, Triumph-Adler-Royal, Inc. and who were terminated or laid off on or before March 23, 1985 as a result of the subcontracting and relocation of bargaining unit work, by paying such employees what they normally would have earned from the date of their termination until March 23, 1985, with interest. The bargaining unit is:

> All full-time and regular part-time production and maintenance employees, warehousemen, factory clerks, shipping and receiving clerks and quality control technicians formerly employed by Roytype Division, Triumph-Adler-Royal, Inc. at its Newington facility, excluding managerial employees, office clerical employees and guards, professional employees and supervisors as defined by the National Labor Relations Act.

OLIVETTI OFFICE U.S.A., INC.

Dated _____ By _____
(Representative) (Title)

OLIVETTI SUPPLIES, INC.

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Commercial Plaza, 21st Floor, Hartford, Connecticut 06103-3599, Telephone 203-240-3373.

CERTIFICATE OF SERVICE

This is to certify that on this the 8th day of March, 1991, a copy of the foregoing proposed Judgment was mailed, via U.S. mail, postage prepaid, to:

Susan Price-Livingston, Esq.
Gould, Livingston, Adler & Pulda
606 Farmington Avenue
Hartford, CT 06105

Aileen Armstrong
Deputy Associate General Counsel
NLRB
1717 Pennsylvania Avenue, NW
Washington, DC 20570

/s/ Brian Clemow
BRIAN CLEMOW

APPENDIX I

STATUTORY PROVISIONS INVOLVED
UNITED STATES CODE, TITLE 29

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§ 160. Prevention of unfair labor practices

* * * *

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required

of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of Section (a) (1) or section (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken by the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners therof, such member, or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of ap-

peals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modied or new ndings, which ndfiings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any for the modification, or setting aside of its

original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

FILED
AUG 2 1991
OFFICE OF THE CLERK

No. 91-8

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,
Petitioner,

v.

OLIVETTI OFFICE U.S.A., INC. and OLIVETTI SUPPLIES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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No. 91-8

IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,

Petitioner,

v.

OLIVETTI OFFICE U.S.A., INC. and OLIVETTI SUPPLIES, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

I. PRELIMINARY STATEMENT

The petitioner, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 376

("UAW Local 376") has filed a petition for a writ of certiorari, seeking review of the decision of the Court of Appeals for the Second Circuit in consolidated Case Nos. 90–4068, 90–4082 and 90–4094, issued on February 14, 1991 and set forth at 926 F.2d 181. This brief in response to the petition for a writ of certiorari is respectfully submitted on behalf of respondents Olivetti Office U.S.A., Inc. and Olivetti Supplies, Inc.[1]

II. COUNTER–STATEMENT OF THE CASE

On April 9, 1984, the respondents' predecessor in interest, Roytype Division, Royal Business Machines, Inc. ("Roytype") notified its employees that in order to reduce substantial operating losses, Roytype had no alternative but to relocate its Newington, Connecticut manufacturing operations. This decision followed extensive discussions with union representatives, which began on November 21, 1983, regarding the company's historical losses of millions of dollars per year, its projected losses for the future, and prior attempts to reduce manufacturing costs. During these discussions, the parties tried unsuccessfully to find alternatives which would allow the company to reduce its operating losses to a point where the company could break even while remaining at its Newington facility.

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1 Respondent Olivetti Office U.S.A. is owned by respondent Olivetti Supplies, Inc. and by Triumph–Adler AG. Respondent Olivetti Supplies, Inc. is owned by Baltea S.p.A., which is in turn owned by Olivetti Office S.R.L., which is owned by Ing. C. Olivetti & C. S.p.A. There are no subsidiaries or affiliates of either Olivetti Office U.S.A., Inc. or Olivetti Supplies. Inc.

In the course of these discussions and at the request of the union, Roytype provided the union with substantial amounts of information regarding Roytype's financial condition, together with information regarding the potential savings which could be secured by subcontracting or relocating Roytype's manufacturing operations. The information demonstrated that the potential savings from relocating the production work from Connecticut amounted to $2.6 million per year, as compared to a total one–time relocation cost of $2 million. Of the potential $2.6 million annual savings, just under $2 million was in wages and fringe benefits, with the remainder resulting from reduced overhead costs, including non–union salaries and fringe benefits, rent and utilities. The union conceded that it could find no alternative which would allow the company to achieve such a significant savings and still remain in Connecticut.

Despite the fact that after several months of discussions, both the union and the company had concluded that relocation was inevitable if the company were to become financially viable, the union on March 28, 1984 requested large amounts of additional information from the company, and refused further discussions until the information was provided. However, because it had become clear to all parties that there was no economic alternative to relocation, and because the company needed to curtail its staggering losses which were mounting daily, the company was compelled to proceed with the relocation plan. The company notified its employees on April 9, 1984 that the relocation plan would be implemented.

Given the complexity of Roytype's operations, the relocation plan had to be implemented over a three year

period, beginning in 1984. Relocation was completed in 1987, at a total cost in excess of $4 million. Because the relocation plan was implemented in stages over a three year period, certain operations continued in Connecticut during the relocation process.[2] In March of 1985, the union and the company reached agreement on a successor to their existing collective bargaining agreement, which expired on March 23, 1985, to cover the few employees who remained in Connecticut as the relocation process was completed. At the same time, the parties reached agreement on the effects of the relocation decision.[3]

On April 18, 1984, unfair labor practice charges were filed against Roytype by the union with the National Labor Relations Board ("NLRB" or "Board"). A hearing was held before an administrative law judge from January 28 through February 1, 1985. In a decision dated August 20, 1985, the judge concluded that Roytype had violated Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act ("Act" or "NLRA") by failing to furnish information to the union. He further concluded that Roytype had violated Sections 8(a)(1), 8(a)(3) and 8(d) of the Act by discriminating against

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2 In its petition, the union states that six months after the judge's initial decision, the company modified its lease to accelerate its termination date. The company did not modify its lease to accelerate its termination date, but entered into a lease modification agreement whereby it leased back a portion of the Newington facility which was no longer needed, at a cost of $125,000.

3 There is no dispute in this case that the company fully satisfied its obligation to bargain over the effects of the relocation decision.

its employees by failing to provide the union with information and thereby failing to bargain in good faith, and by terminating bargaining unit employees through plant closure in violation of the terms of the contract.

The judge declined to order restoration of the work to Connecticut, a remedy which he found impractical and unduly burdensome. The judge did, however, order back pay for bargaining unit employees from the date of layoff through the expiration of the collective bargaining agreement between Roytype and the union on March 23, 1985.

All parties filed exceptions to the decision of the judge with the NLRB. On June 30, 1987, nearly two years after the judge issued his decision, the Board issued its decision. The Board ruled that the judge's finding regarding Section 8(a)(3) of the Act exceeded the scope of the issues litigated. However, the Board held that Roytype had violated Sections 8(a)(1) and 8(a)(5) by failing to bargain to impasse before implementing its subcontracting and relocation plans, and by refusing to furnish the union with requested information. The panel remanded the case to the judge to determine the appropriate remedy, based upon the judge's apparent error in assuming that the Newington facility had been completely shut down.

In accordance with the Board's remand, a hearing was held before the administrative law judge from November 3 through November 5, 1987. On March 31, 1989, nearly a year and a half after the conclusion of the hearing, the judge issued a supplemental decision. The judge ordered Roytype to bargain with the union over the decision to subcontract and relocate work from the Connecticut facility and to pay

all bargaining unit employees until the bargaining obligation was satisfied.

On May 22, 1990, more than a year after the judge issued his decision, and over six years from the initial filing of charges, the Board issued a supplemental decision and order. In place of the judge's remedy, the Board ordered Roytype to offer reinstatement to all bargaining unit employees at Roytype's current facilities, displacing, if necessary, any persons employed at those facilities. Further, the Board ordered Roytype to pay all employees back pay from the date of their layoff "to the date of the offer of reinstatement, or for the employees who decide not to relocate, until the date they secure substantially equivalent employment with other employers."

On June 1, 1990, Olivetti Office U.S.A., Inc. filed a petition for review pursuant to Section 10(f) of the NLRA with the Court of Appeals for the Second Circuit. On July 19, 1990, Olivetti Office U.S.A., Inc. and Olivetti Supplies, Inc. filed an amended petition for review adding Olivetti Supplies, Inc. as a petitioner. The union also filed its own petition for review dated June 25, 1990. On July 19, 1990 the Board filed a petition for enforcement of its order. The three cases were then consolidated.

The Court of Appeals for the Second Circuit issued its decision in the consolidated cases on February 14, 1991. In its decision, the Second Circuit affirmed the Board's determination that the company committed an unfair labor practice, but found that the remedial order imposed by the Board served no legitimate purpose of the Act. The court therefore modified the Board's order to terminate back pay

on March 23, 1985, the date on which the parties reached agreement on a new collective bargaining agreement, and presumably would have concluded negotiations over work relocation if bargaining to impasse had occurred, and enforced the Board's order as modified.

III. ARGUMENT

The petitioner presents two questions for review. As discussed below, neither of these two questions present the "special and important reasons" which justify review.[4]

The first question proposed by the petitioner asks whether the Second Circuit's refusal to enforce the NLRB's remedy due to the NLRB's six-year delay in reaching a final decision requires the consequences of the NLRB's delay to be placed upon wronged employees to the benefit of wrongdoing employers. The question is not appropriate for Supreme Court review for several reasons.

First, the question completely misstates the basis for the Second Circuit's refusal to enforce the NLRB's order. That refusal was not based on the NLRB's six year delay per se, but on the failure of the Board's remedy to address the wrong to be remedied, and on the failure of such a belated

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4 Rule 10.1 of this Court expressly states that a petition "will be granted only when there are special and important reasons therefor." While the considerations specifically set forth in Rule 10.1 are not intended to be exhaustive, the two questions posed by the petitioner do not in any way raise the kind of issues provided as examples in that Rule.

remedy to further any legitimate purpose of the NLRA. Moreover, despite the petitioner's arguments to the contrary, the decision of the Second Circuit is not inconsistent with this Court's decisions in NLRB v. J.H. Rutter–Rex Mfg. Co., 396 U.S. 258 (1969) or Sure–Tan, Inc. v. NLRB, 467 U.S. 883 (1984), nor is it in conflict with the holdings of the Third and Sixth Circuits in NLRB v. Wallkill Valley General Hospital, 866 F.2d 632 (3d Cir. 1989) and NLRB v. Seligman & Associates, 808 F.2d 1155 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988).

The petitioner would have this Court believe that the Court of Appeals considered the Board's delay in a vacuum, simply deciding that because the Board delayed excessively, its order was automatically unenforceable. That is plainly not the case. Rather, the court examined the Board's delay in order to determine whether, given the passage of time, the Board's remedial order served any legitimate purpose of the Act. The court concluded that the Board's order not only failed to serve a legitimate purpose of the Act, given the passage of time, but also wholly failed to remedy the wrong committed.

As the Second Circuit recognized, the violation found by the NLRB was not the company's relocation of operations from Connecticut, but rather its relocation of those operations without first fully satisfying its statutory obligation to bargain to impasse. The Board's back pay order, which required the respondents to pay back pay for a period of at least six years, and thereafter into the indefinite future, utterly failed to remedy the wrong committed, since it necessarily assumed that had the parties engaged in continued discussions concerning the relocation decision in

1984, they would never have reached agreement or even a bona fide impasse over the issue.

The Second Circuit recognized the absurdity of that assumption, and examined the evidence to determine how long the parties would reasonably have continued discussing the relocation issue before reaching agreement or impasse. The court found, based on the evidence in the record, that had the parties bargained over the relocation decision, the process would have continued, at the longest, to the point when a new collective bargaining agreement was negotiated.

The court then recognized that the Board's order, which obligated the company to pay back pay indefinitely, provided employees with an enormous windfall which went far beyond compensating them for any actual losses caused by the underlying offense. Because such an order served only to penalize the employer and failed to remedy the wrong committed, the court concluded it exceeded the Board's authority and was therefore unenforceable. The court therefore modified the Board's order to provide a remedy which compensated the employees for their actual losses.

Such a result is in no way inconsistent with this court's decision in Rutter-Rex. In Rutter-Rex, the NLRB ordered an employer which had improperly failed to reinstate striking employees to provide back pay to those employees through December 1961, the time when the NLRB filed a back pay specification. The Court of Appeals modified the Board's order to eliminate all back pay accrual after July 1, 1959 because the NLRB had engaged in an inordinate delay which

had lulled the employer into the belief that no further action would be taken by the Board. This Court reversed the Court of Appeals' ruling, stating that "the Court of Appeals' modification, cutting off the accrual of back pay at the arbitrary date of July 1, 1959, left the employees who had not been reinstated by that date worse off than they would have been but for the company's wrongful action in refusing reinstatement." Id. at 263 (emphasis added).

Quoting Nathanson v. NLRB, 344 U.S. 25, 27 (1952), this Court stated in Rutter–Rex that "[a] back pay order is a reparation order designed to vindicate the public policy of the statute by making employees whole for losses suffered on account of an unfair labor practice." Id. at 263. The Court further noted that back pay orders issued by the NLRB "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Id. at 263 (quoting NLRB v. Seven–Up Bottling Co., 344 U.S. 344, 346–47 (1953)).

In Rutter–Rex, were it not for the employer's violation of the Act, the employees who were the beneficiaries of the Board's remedy surely would have been gainfully employed throughout the period covered by the Board's back pay order. In the present case, by contrast, the Roytype employees could not reasonably have expected to remain employed while their union negotiated for more than six years with a company losing several million dollars per year. To the extent the Board's remedy continued beyond the latest point at which those negotiations would logically have concluded, it constituted a windfall to the affected em-

ployees and an unwarranted penalty to their former employer.

Contrary to the petitioner's assertions, the court's decision also is entirely consistent with this Court's decision in Sure–Tan, Inc. v. NLRB, 467 U.S. 883 (1984). In Sure–Tan, the employer committed an unfair labor practice by reporting its undocumented alien employees to the Immigration and Naturalization Service ("INS") in retaliation for their participation in union activities. Following this notice to the INS, the illegal workers elected to voluntarily return to Mexico rather than face deportation proceedings. In fashioning a remedy for this violation of the Act, the Seventh Circuit Court of Appeals ordered the employer to make offers of reinstatement to the former employees and to pay the employees back pay for a minimum of six months. The Court of Appeals did so despite its recognition that the six month minimum not only was "obviously conjectural," but also likely exceeded the amount of pay to which the employees otherwise would have been entitled. 672 F.2d at 606 (7th Cir. 1982).

This Court found that the Seventh Circuit had exceeded its narrow scope of review by providing an irreducible minimum of six months' back pay for each employee. This Court explained that "a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." 467 U.S. at 900 (emphasis in original) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941)). The Court concluded that "[t]he [Seventh Circuit's] imposition of this minimum back pay award in the total absence of record evidence as to the circumstances of the individual

employees constitutes pure speculation and does not comport with the general reparative policies of the NLRA." Id. at 901 (emphasis added).

The Seventh Circuit's decision in Sure-Tan stands in sharp contrast to the decision at issue here. The Second Circuit understood very clearly its limited role in reviewing NLRB orders. The court also recognized, however, that as this Court has explained, the role of courts of appeals in reviewing NLRB orders "is not that of a passive conduit" and that "the rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action." Detroit Edison Co. v. NLRB, 440 U.S. 301, 317 (1979).

In modifying the NLRB's order in this case, the Second Circuit was doing precisely what this Court directed in Sure-Tan—to carefully scrutinize the NLRB's order to ensure that it was sufficiently tailored to remedy the actual consequences of the unfair labor practice at issue. The Second Circuit specifically examined the underlying factual circumstances of the case and properly determined, based upon the record, that bargaining over the relocation decision would not have continued beyond the time when the parties reached agreement on a new contract. Thus, in line with this Court's teachings, the Second Circuit modified the Board's order so as to remedy the underlying conduct at issue, in view of the facts and circumstances in the record.[5] See Local 60, United Bhd. of Carpenters and Joiners v. NLRB, 365 U.S. 651, 655 (1961).

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5 In its petition, the union states that the Court of Appeals not only ignored the limitations placed on judicial review by this Court in *(Footnote cont.)*

Finally, while the petitioner claims that this Court should grant certiorari on the first question because "[i]ntercession by this Court is also needed to resolve the conflict between the circuits on an important question of federal law," Pet. Br. p. 9, the petitioner's contention is simply inaccurate. There is no split between the circuits on the issue of how the Board's delay should affect a remedy for a violation of the NLRA.

Of the two circuit court decisions from which the petitioner claims the Second Circuit diverges, only one, NLRB v. Wallkill Valley General Hospital, 866 F.2d 632 (3rd Cir. 1989) addresses the issue of Board delay with regard to denying enforcement of its order. The other, NLRB v. Seligman and Associates, Inc., 808 F.2d 1155 (6th Cir. 1986), does not even deal with the issue of NLRB delay. Moreover, like the employees in Rutter–Rex, and unlike the Roytype employees involved in this case, the wrongfully discharged em-

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(Footnote cont.)

Sure–Tan, but also "gutted the remedial authority of the Board by allowing the Employer to profit from deliberate wrongdoing." Pet. Br. p. 12. Neither the Board nor the Court of Appeals made any finding that the employer engaged in any deliberate wrongdoing. The union bases its claim on the fact that the company did not halt the relocation process once the administrative law judge made his initial determination that the company had violated the Act in August of 1985. Although Roytype may not have completely vacated the Newington facility by the time the administrative law judge issued his initial decision, all three phases of the relocation plan had either been fully completed or substantially implemented by that time, and nearly two–thirds of the bargaining unit employees had been laid off. Roytype had by that time expended such large sums of money in carrying out the relocation plan that its implementation was effectively irreversible.

ployees in Seligman would have continued to work for the employer for the entire period of the back pay order had the unfair labor practice not been committed.

In Wallkill, a decertification petition was filed by the bargaining unit employees. However, since several unfair labor practice charges were pending at the time, the NLRB held the decertification petition in abeyance until the resolution of the unfair labor practice charges.[6] Several years passed from the filing of the initial unfair labor practice charges to the NLRB's final determination against the employer. During this period, the employer unilaterally changed many terms and conditions of employment. Following the Board's decision, the employer argued before the Third Circuit that the Board's inordinate delay in deciding the charges pending before it should preclude enforcement on the Board's order to rescind all unilateral changes.

Unlike the case at bar, the NLRB's remedial order in Wallkill requiring the employer to rescind upon request of the union all unilateral changes found to be unlawful, served the remedial purpose of the Act by making employees whole for the wrong committed. The delay by the NLRB in issuing its final order did not serve to undermine the remedial purpose of the order. Because the employer in Wallkill was relying only on "mere delay" in support of its claim for denial of enforcement of an NLRB order, the Third

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6 Under then controlling law, the employer was required to preserve the status quo with respect to the terms and conditions of employment until the decertification issue was resolved.

Circuit granted enforcement of the order in line with Supreme Court precedent in Rutter–Rex.

Although the petitioner would have this Court believe otherwise, the Second Circuit has also concluded that "mere delay" is insufficient to deny enforcement of an NLRB order. In NLRB v. Aeronautical Industrial District Lodge No. 91, 934 F.2d 1288 (2d Cir. 1991), the Second Circuit found that the administrative delay of the NLRB between the unlawful acts and the remedial order did not preclude enforcement of the remedy, because the order served the remedial purpose of the Act by making wronged individuals whole. The court distinguished its own decision in Emhart Indus. Hartford Div. v. NLRB, 907 F.2d 372 (2d Cir. 1990), in which the court refused to enforce the NLRB's order because as a result of inordinate Board delay, the order made little sense due to changed circumstances and failed to serve the remedial purpose of the Act to make wronged employees whole.

Moreover, "[o]ther circuit courts of appeals have been quick to recognize their responsibility to deny enforcement of NLRB orders rendered pointless and obsolete by virtue of the NLRB's self–inflicted administrative delay." NLRB V. Mountain Country Food Store, Inc., 931 F.2d 21, 23 (8th Cir. 1991) (passage of six years between filing of an unfair labor practice charge and NLRB's final decision against the employer resulted in an order which was "pointless and obsolete by virtue of the NLRB's self–inflicted administrative delay"); Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991) (four year delay by NLRB and events subsequent to filing of unfair labor practice charge could not be ignored in developing a remedy that appropriately protects

employee rights); Continental Web Press, Inc. v. NLRB, 742 F.2d 1087 (7th Cir. 1984) (Board delay rendered it likely that a bargaining order would be irrelevant to current conditions in the plant); NLRB v. Maywood Plant of Grede Plastics, 628 F.2d 1 (D.C. Cir. 1980) (order proposed by Board had become unenforceable or senseless by the time enforcement was sought); NLRB v. Greensboro News & Record, Inc., 843 F.2d 795 (4th Cir. 1988) (NLRB's order both unnecessary and obsolete due to the Board's three year delay).

Like the first question presented by the petitioner, the second question is based entirely on a misstatement of the basis for the Second Circuit's decision. As the premise for its second question, the petitioner asserts that the Court of Appeals "fashion[ed] its own remedy based upon its determination that bargaining over the work relocation decision would have concluded as of the date bargaining over the effects of the decision concluded." Pet. Br. p. i. Contrary to the petitioner's assertions, the court did not conclude that bargaining over the relocation decision necessarily would have concluded as of the time bargaining over the effects of that decision reached conclusion. What was critical to the Court of Appeals, and what the petitioner ignores, is the fact that on March 23, 1985, the parties reached agreement on a new collective bargaining agreement.

The court specifically concluded, based on the evidence in the record, that "had the parties bargained over [the relocation decision], the process would have continued, at the longest, to the point when a new collective bargaining agreement was negotiated." Pet. App. p. 18a. While the parties did reach an agreement concerning the effects of the relocation decision at the same time they reached an agree-

ment on the new contract, it was the parties' negotiations over the new contract, and not simply the parties' agreement over the effects of the relocation decision, which formed the basis for the court's judgment with regard to how long bargaining would have occurred.[7]

From its faulty premise, the petitioner leaps to the conclusion that review of the second question presented is necessary, because the Court of Appeals' decision "allow[s] effects bargaining to excuse an employer's violation of its duty to engage in decision bargaining," Pet. Br. p. 14, and therefore conflicts with Supreme Court precedent in failing to recognize a distinction between decision bargaining and effects bargaining.

First, the petitioner's contention that the Court of Appeals departed from Supreme Court precedent in failing to recognize the distinction between decision bargaining and effects bargaining borders on the frivolous. In its decision, the Court of Appeals took great pains to distinguish between decision bargaining and effects bargaining. Indeed, as the court recognized, one of the defects of the Board's decision was that it "compensate[d] union workers for the effects of the work transfer rather than for the unlawful decision to transfer work without bargaining." Pet. App. p.

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7 As discussed above, the court's analysis of the evidence to determine how long bargaining would have occurred was in accordance with the directives of this Court that Board orders must remedy the actual losses of employees caused by the underlying violation, Sure-Tan, 467 U.S. at 900, and that Board orders must not be punitive. United Bhd. of Carpenters, 365 U.S. at 655.

16a (emphasis in original). Thus, it can hardly be said that the Court of Appeals did not appreciate the distinction between decision bargaining and effects bargaining, as articulated by this Court in such cases as Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964) and First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

Moreover, as discussed above, the Court of Appeals' decision does not allow effects bargaining to excuse an employer's failure to engage in decision bargaining. The decision imposes on respondents a back pay liability which covers the majority of the former Roytype workforce and which runs from the date of the first layoffs in 1984 to the conclusion of a new contract in 1985. A penalty which amounts to several hundred thousand dollars can hardly be characterized as excusing a violation of the Act.

While the petitioner suggests that the Court of Appeals has merged decision bargaining and effects bargaining together, the petitioner's contention is wholly unsupported by, and indeed belied by, the Court of Appeals' decision itself. The Court of Appeals simply concluded, based on the record in this particular case, that bargaining over the decision to transfer work would not have continued beyond the point at which the parties reached agreement on a new contract, since the issue of work relocation inevitably would have played a key role in the negotiations.[8]

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8 Petitioner claims that such negotiations could not have resulted in impasse or agreement in the absence of the information the union requested but did not receive. This ignores the fact that upon the

(Footnote cont.)

IV. CONCLUSION

Pursuant to the holdings of Rutter–Rex and Sure–Tan, where an NLRB order does not remedy the wrong committed or where delay causes the remedy ordered to no longer serve any remedial purpose of the NLRA, the back pay remedy must be modified to remedy the actual consequences of the unfair labor practice committed. Because the Second Circuit's decision below is in line with the precedent of this Court in Rutter–Rex and Sure–Tan, and because there is no conflict between the circuits on a question of federal law, this Court should deny the petitioner's request for review on the first question.

Additionally, because the Court of Appeals did not find that bargaining over the relocation decision necessarily would have concluded as of the time bargaining over the effects of that decision reached conclusion, this Court should deny the union's petition for a writ of certiorari on the second question.

(Footnote cont.)

expiration of the collective bargaining agreement in March of 1985, the parties would not have had to rely on the NLRB to resolve their differences over work relocation, since both would be free to resort to economic self–help (i.e. a strike or lockout) to force the talks to a conclusion. Even if these tactics had not produced a prompt settlement, they would have suspended the employer's obligation to meet its payroll during the period of the ensuring work stoppage covered by the Board's back pay order.

For the foregoing reasons, Olivetti Office U.S.A., Inc. and Olivetti Supplies respectfully request that the petition be denied in all respects.

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Supreme Court, U.S.
FILED
SEP 11 1991
OFFICE OF THE CLERK

(3)

No. 91-8

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376,
PETITIONER

v.

OLIVETTI OFFICE U.S.A., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by setting aside the Board's remedy for petitioner's unfair labor practice and by then fashioning its own remedy instead of remanding the case to the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 926 F.2d 181. The supplemental decision and order of the National Labor Relations Board (Board) (Pet. App. 19a-43a) are reported at 298 N.L.R.B. No. 73. The initial decision and order of the Board (Pet. App. 44a-93a) are reported at 284 N.L.R.B. 810.

JURISDICTION

The judgment of the court of appeals (Pet. App. 97a-99a) was entered on March 27, 1991. A petition for rehearing was denied on April 2, 1991 (Pet. App. 95a). The petition for a writ of certiorari was filed on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Olivetti (formerly Roytype Division, Triumph-Adler Royal, Inc.) (the Company) was engaged in manufacturing and distributing typewriter ribbons and cartridges at a plant in Newington, Connecticut. Petitioner UAW Local 376 (the Union) entered into a two-year collective agreement with Olivetti, effective March 28, 1983, covering production employees at that plant. Pet. App. 56a.

In mid-1983, the Company began developing a cost-reduction program to counter serious financial losses. Pet. App. 57a. In November 1983, the Company met with the Union to discuss its program and the Union requested various financial information to verify the claims of financial hardship. At a February 21, 1984, meeting with the Union, the Company supplied only some of the information requested and informed the Union that it intended to make final recommendations by March 21 to the parent company's board of directors on a subcontracting and relocation plan. The Union protested the short time frame as insufficient for bargaining and also complained that the Company had not furnished all of the information requested. Pet. App. 57a-60a.

The Union and the Company met four times in March to discuss the Company's plans; at the final meeting the Union rejected the Company's last coun-

ter-proposal because the Company had not furnished all of the previously requested information. Pet. App. 62a-64a. On April 9, the Company announced its intention to subcontract some of the unit work to a firm in Mexico, and to relocate the plant in a southeastern State to perform the rest of the unit work. Pet. App. 30a.

The Company began the first phase of its plan in July 1984 by subcontracting unit work to a company located on the border of Texas and Mexico. Pet. App. 65a. The first layoffs and terminations of the Newington employees occurred in November 1984. Pet. App. 30a. Relocation of additional unit work to Georgia began in the first quarter of 1985. The Company continued its previous business of manufacturing and distributing typewriter ribbons at these new locations with newly hired employees. Pet. App. 5a, 31a. The Company sold its wide film and fabric operation, a separate component of its business, in May 1986. Pet. App. 22a n.8. The remainder of the Newington employees were terminated in July 1986, and the Company vacated the Newington plant completely in March 1987. Pet. App. 30a-31a.

During the relocation/subcontracting process the Company and the Union negotiated a successor two-year collective-bargaining agreement that became effective March 25, 1985. That agreement was essentially the same as the initial agreement, except for an increase in the wage and benefit structure. C.A. App. 1438-1457. The parties also negotiated a side agreement to settle negotiations over the effects of the Company's work relocation decision. That agreement provided for the Company to pay all employees laid off after November 21, 1984, a lump sum of $250 and a further payment of $50 to settle pension issues. *Id.* at 1622.

2. In its initial June 30, 1987 decision, the Board, upholding the administrative law judge (ALJ), found that the Company had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing its decision to subcontract and relocate unit work without bargaining to impasse with the Union, and by failing to furnish the Union with relevant information that was necessary for bargaining. Pet. App. 44a-51a. However, the Board remanded the case to the ALJ because the remedial order recommended by the ALJ—which merely awarded the employees who had been terminated back pay from the date of their termination to March 23, 1985, when the collective bargaining agreement expired (Pet. App. 92a)—was erroneously premised on the assumption that the Newington plant had closed down by the time the ALJ issued his decision.[1] Pet. App. 51a.

In its supplemental decision and order issued on May 22, 1990, the Board found, in agreement with the ALJ, that an order requiring the Company to reestablish the Newington plant would be unduly burdensome. Pet. App. 20a. However, the Board disagreed with the ALJ that it would be appropriate to require the Company to bargain over the reestablishment of the Newington plant. Pet. App. 21a. Finding that a remedy "tailored to the present rather than past circumstances better effectuates the purposes and policies of the Act," the Board ordered the Company to offer its Newington employees reinstatement at its facilities where the unit work had

[1] The Board requested the parties to present facts relating to the hardship involved in transferring back to the Newington plant any of the unit work unilaterally subcontracted or relocated.

been relocated (with necessary traveling and moving expenses), dismissing, if necessary, any persons hired at those facilities. *Ibid.*[2] The Board further ordered the Company to make the Newington employees whole for any loss of earnings and other benefits suffered from the date of their termination to the date of the offer of reinstatement or, for employees who chose not to relocate, until they secured substantially equivalent employment. Pet. App. 22a-24a.[3]

3. The court of appeals upheld the Board's findings that the Company had unlawfully refused to bargain over its subcontracting and relocation plan and to supply relevant information concerning its financial condition. Pet. App. 3a. The court concluded, however, that the Board's back pay and reinstatement remedy was not appropriate in the circumstances of this case.

The court acknowledged that a remedy ordered by the Board is subject to limited judicial review, but added that "we cannot turn a blind eye to the ex-

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[2] If there were insufficient work for all employees to be offered reinstatement, the Board directed the Company to place the names of those for whom work is not available on a preferential hiring list, in order of their seniority, and to offer them jobs in the future before hiring other persons. The Board noted the Company's contention that reinstatement of the Newington employees would be impractical due to changes in the Company's operations and organizational structure, but concluded that consideration of that issue should be left to the compliance stage of the proceeding. Pet. App. 21a-22a & n.7.

[3] The order required the Company to make whole those employees formerly employed in the wide film and fabric operation until May 1986, when that operation was sold, offset by any severance payments. Pet. App. 22a n.8.

tensive administrative delay by the Board" and to the fact that "enforcement of the Board's remedy more than six years after the misconduct would truly 'mock reality.'" Pet. App. 15a. The court explained that the wrong committed by the Company lay not in its decision to subcontract and relocate, but in reaching that decision without first bargaining in good faith with the Union. Pet. App. 16a. The Board's back pay order, the court concluded, "is unreasonable because it assumes that, had the parties negotiated, those negotiations would have continued for six years, and possibly into the future." Pet. App. 17a.[4]

Recognizing that ordinarily it would remand this case to the Board for further proceedings to impose a proper remedy, the court, stating that "[i]t would be a grave injustice to prolong this matter," proceeded to modify the Board's order. Pet. App. 17a. The court agreed with the Company that "the remedy should be limited to back pay for a reasonable period of time in which the parties should have bargained over the work transfer decision." *Ibid.* The court found that, had the parties bargained over the work-transfer decision, "the process would have continued, at the longest, to the point when a new collective bargaining agreement was negotiated. At that point, any negotiations pertaining to the work-

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[4] The court also stated that, "[i]n essence, the Board's order compensates workers for the *effects* of the work transfer rather than for the unlawful *decision* to transfer work without bargaining. Such a remedy is improper here, however, because the affected bargaining-unit workers have already been compensated for the *effects* of the work-transfer decision by a contractual obligation entered into between the Company and the Union in conjunction with the successor collective bargaining agreement." Pet. App. 16a.

transfer decision would have merged into the negotiations for a new contract." Pet. App. 18a. Accordingly, the court decreed that "back pay for all affected bargaining unit employees should end as of March 23, 1985." *Ibid.*

Finally, the court declined to enforce the Board's reinstatement order. It concluded that, "[i]n the years intervening between the Company's unfair labor practices and the Board's final remedy, the internal structure of the Company has changed to such a degree as to make reinstatement [of all bargaining unit employees] not only unreasonable but unrealistic." Pet. App. 18a.

ARGUMENT

The Board agrees with petitioner that the court of appeals erred in concluding that the Board's back pay and reinstatement order was not an appropriate remedy for the Company's refusal to bargain over the work-transfer decision and in fashioning its own remedy for that violation instead of remanding the remedy question to the Board for reconsideration. Nonetheless, the Board does not believe that, under the circumstances of this case, further review by this Court is warranted merely to correct the court of appeals' errors.

1. The court of appeals held that the Board's remedy was inappropriate because, in the court's view, it did far more than merely compensate the employees for the wrong that had been committed. The court apparently believed that, because bargaining over the decision to relocate would not in any event have continued for the entire six-year period following implementation of the decision to relocate, requiring the Company to provide back pay for that entire period

"compensates union workers for the *effects* of the work transfer rather than for the unlawful *decision* to transfer work without bargaining." Pet. App. 16a. Since the workers had already been compensated pursuant to the 1985 collective agreement for the effects of the transfer, the court held that the Board's remedy was improper. Cf. *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1953) (purpose of back-pay award is to "mak[e] the employees whole for losses suffered on account of an unfair labor practice").

The Board disagrees with the court of appeals' conclusion. Had the Company complied with the law by providing relevant information so that the Union could bargain intelligently with it over its decision to transfer work, the employees would have retained their jobs and earned their wages at least until the Company bargained to a good-faith impasse; had the parties reached agreement on an alternative to the transfer of work, the employees would have retained their jobs still longer. The Company's failure to fulfill its statutory obligation makes it impossible to determine how long such bargaining would have gone on, or the extent to which the Company might have modified its work-transfer decision as a result of the bargaining. Consequently, the Board's remedy reasonably placed the burden of the uncertainty on the Company that committed the unfair labor practice, rather than on the employees who were the innocent victims.

Nonetheless, the Board does not believe that further review is warranted. Petitioner contends that the court of appeals' decision is "directly contrary" (Pet. 7) to this Court's decision in *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). In *Rutter-Rex*, however, the court of appeals impermissibly shifted

the burden of agency delay from the wrongdoing employer to the innocent employees by cutting off a back pay award at an arbitrary date, thereby resulting in uncompensated losses to the employees. In contrast, the court in this case found that the Board's remedy was impermissible because it overcompensated employees by providing back pay beyond the time when the required bargaining would have concluded. Although we believe this conclusion was wrong, the court did not hold that the employees, rather than the Company, should bear the burden of the delay in the administrative process.[5]

2. The court of appeals also erred in fashioning its own remedy, rather than remanding to the Board for further remedial proceedings. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984). This error also does not warrant further review by this Court.

The court of appeals recognized that it should ordinarily "remand this case to the Board for further proceedings to impose a proper remedy," Pet. App. 17a, but declined to remand the case in light of excessive delays in the proceedings before the Board. The problem of Board delay has recently been sub-

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[5] Similarly, the court's decision does not conflict with *NLRB* v. *Seligman & Associates*, 808 F.2d 1155, 1161 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988), or *NLRB* v. *Walkill Valley General Hospital*, 866 F.2d 632, 637 (3d Cir. 1989). In both of those cases, the courts of appeals held that the passage of time during the Board's consideration of the case had not altered the fact that the Board's remedy provided appropriate compensation for the wrong that had been committed. In this case, the court of appeals rejected the Board's remedy on the basis of the court's conclusion—with which we disagree—that the remedy compensated the employees for the effects of the work transfer, as to which effects the employer and union had reached a collective agreement.

stantially mitigated, however, and is unlikely to recur.[6] It should be assumed, therefore, that the Second Circuit will respect the division of responsibility between the Board and the courts in future cases. Review is therefore unnecessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

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[6] The Board has implemented the recommendations of the General Accounting Office that it put into place a time limit for each decision stage as well as for final issuance of decisions. Moreover, the Board has reduced its backlog from 1,679 unfair labor practice and representation cases in February, 1984, to 523 cases in January, 1991. See Statement of James M. Stephens, Chairman of the National Labor Relations Board, *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1992: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 102d Cong., 1st Sess. Pt. 7, at 593 (1991).

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